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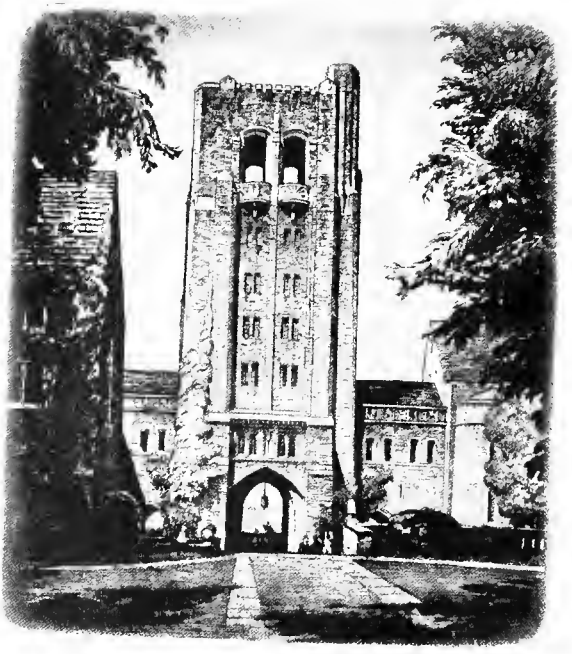

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THE

GREAT LAND QUESTION:

BEING A

VERBATIM TRANSCRIPT

OF THE

Correspondence

IN

DOE versus *ROE*,

BY

CHRISTOPHER CAVANAGH, B.A., LL.B. (LOND.)

ΧΟ. Ἀλλ' ὦ μεγάλαι Μοῖραι, Διόθεν
τῆδε τελευτᾶν,
ᾗ τὸ δίκαιον μεταβαίνει.
Ἀντὶ μὲν ἐχθρᾶς γλώσσης ἐχθρὰ
γλῶσσα τελείσθω (το ὀφειλόμενον
πράσσουσα Δίκη μέγ' ἀϋτεῖ),
Ἀντὶ δὲ πληγῆς φονίας φονίαν
πληγὴν τινέτω. Δράσαντι παθεῖν,
τριγέρων μῦθος τάδε φωνεῖ.

Æsch. Choep. 298—306.

LONDON:
STEVENS AND HAYNES,
Law Publishers,
BELL YARD, TEMPLE BAR.
1875.

CAUTION.

δυοῖν παρόντοιν ἥμισυς λόγος πάρα.

Æsch. Eum. 406.

The Communicator warns the Public against being too hastily carried away by either the sophisms of Doe or the fallacies of Roe.

Let them both have their say before judgment is pronounced.

Audi alteram partem.

5, Essex Court, Temple,
May 15*th*, 1875.

Doe v. *Roe.*

(Correspondence.)

WHITEACRE,
Manor of Dale.

Dear Sir,

It is with no small satisfaction I am at length able to address you in terms of friendship and esteem. During the interval of three and twenty years, which has elapsed since our correspondence was so rudely, though I trust so happily, interrupted, I have learned to admire an opponent with whom I have fought battles so many and of such renown. Heretofore our long-standing acquaintance extending over a period of some two hundred and twenty years has unfortunately been but that of adversaries; now and from henceforth let it be that of friends.*

We have now no cause for division—no bone of contention. Our politics are the same; for in this age of progress and advancement can any thinking being belong to other than the party of movement and enlightenment? In matters of religion we accept universal toleration as one of the axioms of modern thought. What remains? Social existence in general; and surely, sir, we are at one on all the great points, which form the pivots upon which society turns. The constitution of the family—individual ownership of property—the almost infinite range of contract—the principle of competition—representative institutions—above all, the inviolable sacredness of liberty! We are neither communists nor socialists. We recognize an established frame of social life, wherein a graduation of classes is effected by a natural or acquired superiority; it being a

* The writ de ejectione firmæ was invented in the reign of Edward III., but this did not become the general mode of trying rights to land till the time of Henry VII. or Henry VIII. During the Protectorate Chief Justice Rolle remodelled the ancient proceedings by substituting the fictitious plaintiff and defendant John Doe *v.* Richard Roe. The Common Law Procedure Act, 1852, swept away these worthy gentlemen in the present form of ejectment.

fundamental maxim that every one is to have fair play, so that talent, genius, and iudustry may find their proper level, unimpeded by artificial obstacles of any kind, save those only which the public weal render absolutely and imperatively necessary.

But, sir, whilst our theories thus happily harmonize, there are but too many instances in which their obvious dictates are disregarded. How often is the march of civilization suddenly and ruthlessly arrested! How numerous and multiform the attacks upon religious freedom! With what strange and pestilent diseases is the social organism ever and anon smitten!

Yet, pray, do not misunderstand me. It is not to occasional and casual ills I allude, for the best systems will now and again get out of order, and it would be as idle to grieve over such temporary misfortunes as to find fault with the finest piece of mechanism, because like all things human it sometimes goes wrong. The grounds of my complaint are certain standing and permanent obstructions to that continuous advance, which is the sine quâ non of our common improvement. And most conspicuous amongst such obstructions is that antiquated, and, I venture to think, at present absurd system of land tenure and land transfer which still obtain in England. Of all men living you, sir, I deem the most qualified both by nature and experience to handle with me in a sensible and statesmanlike manner the settlement of this intricate and most important question: and hence the liberty I have taken in addressing you in this letter.

It needs no profound or learned course of argument to show how supremely foolish, not to say ridiculous, is the mode, in which the tenure of immoveables is in these days regulated. Only fancy if we were some fine morning to wake up and find our countrymen arrayed in the skins of wild beasts, with all the trappings of the savage—in a word in the very pink of Druidical fashion! Or what should we think of a class of persons calling themselves rational, who insisted the only means of transit should be the four roads of Roman times? In these instances the voice of convenience and common sense is too loud to be inaudible, even to the most obtuse. But when it comes to the maintenance or abolition of a system, adjusted to the necessities of a bygone age, hampered with a thousand rules having no application to an altered state of circumstances, and working an amount of annoyance, expense and injustice not easy to realize, the nation seems stupefied and deaf to all remonstrance.

Why, you will ask, are we drowned in such a lethargy? I reply; first, because of the inherent laziness of human nature; and, secondly, because, having been so long habituated to a state

of discomfort, we have like the bed-ridden patient grown callous to our misfortune.

There is, no doubt, trouble involved in sweeping away the existing manner of holding lands, whilst, in individual causes of disgust, the spur to selfishness is too intermittent and remote to call forth general action.

Then again our endurance has been lightened not only by custom, but also by a large amount of patchwork legislation, though it may be truly observed, in the words of a great thinker when speaking of usury, that in this case also "the law was reformed as a person reforms a tight shoe, who cuts a hole in it where it pinches hardest, and continues to wear it."*

Now, sir, I have a very simple remedy for the canker our land laws breed in the interests of private persons and those of the community generally:—excision, simple and thorough, by one comprehensive statute which shall declare that all property of what kind soever is to be henceforth held and treated in all respects as personal property, so far as the different natures of moveable and immoveable will permit.

Like a skilled surgeon I amputate a limb past cure—persuaded the operation now proposed will be the means of saving from decay the healthy members of the social body.

For the present I shall say no more, but relying on your hearty co-operation and anxiously expecting the favour of an early expression of your views

I beg to subscribe myself

Your obedient Servant,

Richard Roe, Esq. JOHN DOE.

BLACKACRE,
Manor of Sale.

My dear Sir,

Allow me in primis most cordially to reciprocate those sentiments of respect and goodwill your note has so kindly conveyed. I can assure you that my breast also had during our many years of inimical intercourse become at length animated with a deep feeling of reverence and affection for a foe, in whom I could discern the qualities one would most wish to find in a friend. With gladness, therefore, do I seize the

* J. S. Mill, Principles of Political Economy, bk. v. c. 10.

hand of fellowship you have extended—well assured it is the token of an amicable relationship to cease only with death.

I would fain on this joyful occasion of mutual reconciliation pass unchallenged the character with which you have credited me, so that no variance might exist between us. But, sir, the behests of truth are imperative, and with me frankness and open dealing are synonymous with genuine politeness. I must, therefore, claim leave to repudiate any connection with a party which pretends to be ever on the move. Such a pretension, when closely looked at, amounts to nothing less than a self-contradiction—it is utterly suicidal. For—not to mention the psychological and metaphysical difficulty, that, if such a phenomenon did in fact exist, we should be so conscious of it as you seem to imagine,—inasmuch as the differential element requisite for discrimination would then be absent,—I shall merely point out that a party of this description would according to its own programme have on each successive year or day to undo what it had done on the year or day preceding. There is no such flux and reflux possible in human affairs. But even to the possible, yet withal revolutionary, advancement advocated by one great political faction, I am happy to reckon myself the steady but determined enemy. Innovation in any of our established principles or institutions is a flinging to the winds of the experience and traditions of past ages. It is no better than the ruthless squandering by the profligate in an instant of the treasures heaped up by his ancestor's years of toil and sacrifice. Nay, as the loss is more irreparable and the gift more invaluable, so capriciously to dissipate the heritage of posterity is more culpable and calamitous.

Change indeed there may and must be, but let there be no further alteration than is necessary to oil and grease as it were the springs and wheels of our glorious constitution. But do not take the mighty fabric itself to pieces, for to disrupt it is to disrupt the State.

I rejoice to be able to enrol myself with you under the banner of religious toleration. Of course, you understand, we do not in the general indulgence include those sects, which, under the name of religion, adopt practices prohibited by the law without respect to religion. It is no persecution to insist that vaccination shall be enforced or that dancing in the open streets, so as to prove a nuisance, shall be put down, although the religious scruples of some persons might prompt them to do the acts forbidden; for here the reason of the command is aliunde apart altogether from creed. Again, you will join with me in upholding the Established Church; for leaving its benefits

out of view and regarding the matter in a merely constitutional way, what injustice can there be in specially supporting the doctrines of the majority? Nothing can be more in accord with the spirit of our whole government, the one rule of which is, that the vote of the many shall prevail against that of the few.

To come now, sir, to the particular object of your letter (for we are agreed on other social matters), I am astounded beyond measure that a man of your attainments and knowledge should speak of our land system in a tone befitting the speculating ambition of the penniless radical or the haughty ignorance of the raving visionary.

But what of the illustrations you furnish? Is any one so grossly stupid as not to perceive that the produce of the loom and the use of the railway have superseded the employment of the raw hide and unbeaten track for this very reason that they possess such incomparable advantages: and, on the other hand, the law of immoveables has stood its ground, because its foundations are so solid, its structure so magnificent, that neither the enterprise of genius nor the wisdom of successive generations, nor the ever-expanding skill of time, could devise ought to rival or surpass it. Like the kingly oak, every cycle has added to its stability as every attack has tested its strength.

Paul was a benefactor not of litigants only but of all disputants when he laid down the maxim:—Ei incumbit probatio qui dicit non qui negat. For, had I to show our land system ought not to be swept away, I should be in much the same predicament as if I were asked to prove that red is red or loud loud, so self-evident is the proposition.

But, sir, whilst I shall carefully peruse any answer you may forward in support of the opinion you before expressed, I should wish first to hear what you have to say on a simple analogy. The literature of ancient Greece and Rome is for style matchless. So, considered as mere language, the treatment of definitions, names, propositions, and syllogisms in the logic of the schools has never been approached for precision and exhaustiveness. So the architectural monuments presented in our cathedrals are masterpieces. Now, why is all this? Simply because, at the respective eras at which these various things were accomplished, the mind of man devoted itself almost exclusively to the one particular subject in that age highest in popular estimation. And do you imagine now that knight service is abolished, and there is no longer the importance and attributes, which formerly attached to landowners, nor the same reason for tracing out all the minutiæ of their rights,—do you imagine, I say, you could

ever obtain the ability or, if the ability, the devotedness, that could build up anything the least worthy to stand in place of that venerable edifice of the land law you would so recklessly overthrow. A satisfactory reply to this will much surprise

Your humble and faithful servant,

RICHARD ROE.

John Doe, Esq.

WHITEACRE,
Manor of Dale.

Dear Roe,

My best thanks for your despatch and favour just received. I greatly regret there should be so many chasms between our modes of thought—chasms indeed so wide and deep as to render the prospect of union on several important topics remote to the last degree. More especially, however, am I concerned at the broad divergence, that is now proved to exist on the all-vital question mooted in my former letter.

You urge a powerful argumentum ad hominem when you remind me of the stately origin and developed grandeur of that land law, which once formed the corpus juris of English jurisprudence. No one can be insensible to an appeal which causes the mind to travel over the distant past and behold the lord and his vassals gathered together in the baronial hall or marshalled in the field of battle by that one grand scheme of mutual service and protection, whereby most hereditaments were anciently holden. Nor can I deny the marvellous ingenuity or the dialectical acumen with which the principles of the only kind of property, that then existed or was thought worthy of attention, were elaborated. Nor should I refuse to concede that to this feudal régime is to be traced the greatness and majesty of England in subsequent periods. For if there had been no feudal system, there would have been no powerful barons; and if no powerful barons, then no Magna Charta—no Crusades—no Crecy or Poitiers—no Agincourt—therefore no immediate development of foreign commerce, the pedestal upon which all our fortunes repose.

But, sir, excuse me for saying you are guilty, no doubt unintentionally, of a palpable ignoratio elenchi. The probandum is, not whether a beautiful and well-attuned system was once evolved and in action, but whether we are to retain

the tatters and shreds of a garment long out of fashion, ill-fitting, and tripping us at every step; for such in fact is the residue of feudal law come down to our day. When military tenures vanished by force of 12 Chas. 2, c. 24, the raison d'être of their incidents and adjuncts also vanished, and the interpreters and makers of the law must have strangely forgotten the maxim—Omne accessorium cedit principali—to have retained such fragments as primogeniture, feoffment and livery of seisin, entails, &c. Tell me not that these attributes equally belonged to that tenure of free and common socage, into which the holding by homage auncestrel, castleguard, grand serjeanty, and the other varieties of knights' service, were transmitted. Yes, I admit it to have been so, but then those attributes were derived from the more honourable tenures and appertained to them in a peculiar manner, and with their extinction such attributes ought also to have been extinguished—cessante ratione legis cessat et lex. Thanks to gradual legislation and common sense many of the most monstrous and puerile of these half-scholastic, half-juridical technicalities were done away with.

But mark, how fortuitous and tardy was the amelioration! The bounty of Henry VIII. would have been a dead letter if the grantees of confiscated lands of religious houses were debarred from availing themselves of the covenants and conditions, which had been entered into between lessor and lessee; therefore the 32 Hen. 8, c. 34, empowered the assignees of reversioners to take the same advantage of, and in every way to stand in the same position with respect to, the agreed stipulations as the original lessors themselves.

The Statute of Uses having annexed the seisin to the use or trust, disposition by mode of feoffment to the uses of a last will became impossible: hence the 32 and the 34 Hen. 8, which allowed of freehold fee simples, all socage lands and two-thirds of lands in chivalry to be directly devised, though we must come down to 7 Will. 4 & 1 Vict. c. 26, to find a complete ability of disposition over all lands without distinction acquired or after-acquired. Then it was only in the 4 & 5 Anne the stubborn rule of attornment was for ever destroyed. And it was not until 3 & 4 Will. 4, c. 74, those farcical performances fines and recoveries had their fate sealed, the same session having witnessed in the 27th chapter a great improvement in the law of limitations, and a clean and clear riddance of all that cumbrous panoply of real actions (with the exception of dower, writ of right of dower, and quare impedit) with which litigious warfare was carried on, with about as much success and reason

as our military commanders would enjoy, were they to employ the testudo and aries in place of the shell and cannon.

These various reforms, piecemeal and incoherent as they necessarily are, cannot but be utterly insufficient. What we needed and what we need is to pluck up the entire feudal growth root and branch that it may no longer cumber the ground, but give place to a sapling fresh and vigorous, acclimatized to modern ideas and modern requirements. Again, sir, I advocate a fundamental and sweeping measure; nor can renewed leisure and increased thought suggest anything more beneficial than a universal assimilation of the law of realty to that of personalty, with the reservation already mentioned. I shall pause and like Brutus pause I believe in vain for a reply from you or from any man, which shall shake the strength of this conviction. Still do not suppose I am inexorable. Only make out your case and you will find the door is not barred against persuasion by

Your obliged servant,

Richard Roe, Esq. JOHN DOE.

BLACKACRE,
Manor of Sale.

Dear Doe,

Have you ever heard of the historical method of treating jurisprudence? Surely you must be aware there is a successive evolution in the naturally-developed law of every country; and one particular stage differs from another, much as the youthful stripling differs from the staid man; and each is perfect in its own degree, just as the child is in its capacity in no way inferior to the adult in his. Away then with that banter about real actions and what you are pleased to term those farcical performances fines and recoveries!

Have you so utterly forgotten the Roman Law—that, so deservedly styled "Written Reason"—the most splendid monument and model of a polished and perfected jurisprudence ever presented to human consideration? Can you help remembering the most famous of the Legis Actiones—the Actio Sacramenti—which as it was the first to arise so it was the last to disappear, surviving in the Judicia Centumviralia even to the days of Justinian? What was this proceeding whether in the Mancipatio, the In jure cessio, or the Testamentum per æs et libram, but a spiritualized fiction of what was once a materialized fact?

—a fiction unconsciously recording a transition and as useful for and indispensable as an instrument of improvement as the subsequent equity of the prætors or direct legislation of the comitia or imperial constitutions?

The Legis Actiones and our own real actions had this much of similarity—that they were both highly technical, extremely prolix, and brimful of fictions. But are these common peculiarities to be the subject of reproach and mockery? Or ought we not rather to laugh at the shallowness of the scoffer, who is so profoundly regardless of consistency as to be blind to the advantages, which accrued from the very things he condemns. Had there been no technicality, there would have been no end of litigation; for in that rude stage of pleading there was no more effective means of raising distinct issues, and interest reipublicæ ut sit finis litium. Had there been no prolixity, there would have been no sufficient media of evidence; for in those times reliance had to be placed exclusively on oral witnesses. Had there been no fictions, there would have been no possibility of dealing with any but the simplest state of facts; for at those epochs of infant procedure it was requisite that every act in the contest should be gone through by the parties either really or feignedly.

Those venerable institutions—fines and recoveries—hoary with age and embedded in learning—one might have thought secure from jeers, even from the flippant and unreflecting. That you, sir, should have been betrayed into so offensive and ill-merited a censure, I am ready to attribute to that excessive warmth the advocates of a bad cause are sometimes heated with. You will not I presume call in question the expediency of avoiding the statute De donis. You object not to the object but to the manner of carrying it into effect. Yet consider how admirable and satisfactory was the resource furnished by Taltarum's case and later on by the statute of Henry VIII. The problem was to unfetter the estate and to prevent it from descending for ever per formam doni. On the one hand, a repeal of 13 Edw. I. was not desired at least by those in power and all attempts at that object proved unavailing. On the other, it was not for the interest of commerce that lands should be tied up incapable of alienation. How then was the statute to remain and its evil consequences to be avoided? The solution of this question by a fictitious suit, in which the recoveree or cognizor allowed his right to be barred by judgment of a court of record, must be pronounced to be a triumph of ingenious skill as creditable to our lawyers as was the fiction by which the formulary system obtained to the Roman jurisconsults. Thus

the statute remained but the issue in tail were estopped from claiming the benefit of its provisions. Not one flaw in the iron-like reasoning and process of deduction—all in keeping with clear and unmistakable principles.

And this reminds me of another instance in which the logic of the law stands forth conspicuously. For what can more extort praise than the history of conveyance by lease and release? For when the Statute of Enrolments had made the conveyance of freeholds practically inoperative by bargain and sale, recourse was had to an ordinary lease and then the intended grantee being once in possession the grantor could release the rest of his estate. But how was the trouble of an actual entry avoided? I need not recal the shrewd construction put upon the word "seised" in the Statute of Enrolments, and how, the conveyance of terms by bargain and sale being thus rendered feasible, possession was acquired without entry and the release then made. So the whole transaction took place off the lands through the instrumentality of a couple of deeds. And if you press me I certainly own the legislature did no harm when in 1841 it made a release in all respects as effectual for transfer as a lease and release; or when again in 1845 it awarded to a simple deed of grant the same potency as a conveyance by feoffment and livery of seisin.

Rather, is not this magic power of adjustment to new wants, whether by juristic astuteness or legislative interference, one of the grandest proofs of the expansiveness of those sterling principles, which were cast in a mould of knowledge and forethought now unhappily for ever irreparably destroyed? You can graft and regraft on a parent stock so noble and matured; but once fell the old tree itself and nothing is left upon which to fasten an offshoot.

Well, sir, to return to a point you particularly mentioned, I allude to primogeniture. What rational charge can be brought against an institution so excellent and beneficial baffles conjecture? Is it because it has given us the greatest nobility and gentry of any country in the world? Or because it has saved us so many wars of succession to the Crown? Or is it rather because it is a pre-eminently English custom, and therefore at variance with the aspirations of this cosmopolitan age? I entreat an explicit answer, not indeed expecting you mean seriously to hold to your previous statement, but if such be your intention giving you fair warning your temerity will meet with little quarter from

Your devoted servant,

John Doe, Esq. RICHARD ROE.

WHITEACRE,
Manor of Dale.

My dear Roe,

You have asked me a plain question and I shall endeavour to give you a plain and straightforward answer. That answer must needs be drawn out to considerable length, for, I perceive from the tone in which you talk of primogeniture, I am about to attack a favourite idol from whose worship you will not be driven, save by arguments the clearest and most conclusive.

It is lamentable to think the superstition under which you labour should be of that vulgar type, which lands its votaries in the most monstrous paradoxes, endowing them at the same time with a sovereign and supercilious air of contempt, which becomes the more despotic in proportion as their fanaticism departs further and further from the standard of common sense and common reason.

Really, sir, one would suppose you must be joking when you pretend to father the splendour of our nobility or the tranquillity of our kingly succession on that antiquated and abnormal custom—primogeniture. I cannot persuade myself you are so entirely ignorant of the causal nexus as to assign a single, perhaps unimportant, circumstance, as the sum of that indefinite and countless number of conditions, upon which the production of any given social or political phenomenon depends. Neither can I believe you would stoop to the wretched claptrap, which, by insisting on a particular fact having a temporary and fictitious importance, is calculated to catch the ear of a hustings-gathering, but which, when addressed to a sane man, is nothing less than an insult to his understanding.

Shall I have to inform you, then, how it comes that our upper ten are the uppermost in the world, and the descent of our crown the most orderly and peaceful? The reply must in the first place be similar to that which is equally true whenever we would trace the genealogy of an event of complex origin. And that reply is that the event in question must be the result of the action and reaction of all the agencies, which have directly or remotely contributed to its happening. Hence it seems at first sight impossible ever to arrive at the true cause of an effect of such complicated sequence as a social or political phenomenon. Hence also the unscientific character of those popular parallels between different countries and different epochs, which as some of the antecedents are always different can at best be but accidental though remarkable coincidences. Now you need not fear I am going to inflict on you a dissertation on

sociology. Suffice it that I have pointed out the grossness of your assertions concerning primogeniture, which is but one circumstance collateral with our political constitution—our insular position—our mental character—our escape from a noblesse — which latter a learned writer * deems a most important element in raising the English above the continental nobility—our law and its maxims as, Rex nunquam moritur &c. —and those other innumerable circumstances all of which and the laws of their operation must be taken into account; and thus by an application of the concrete deductive and historical methods we shall be able to obtain data for at least approximate calculation. But enough—the enumeration of a few prominent jointly-working agencies shows the irrationality of relying upon any single one for the generation of a result manifestly arising from all.

There are some combatants whose prowess does not transcend that of the pettiest pigmy coward, against whom, however, their own weapons are turned with greatest effect. Such, sir, I deem an ample justification for taking a shaft from that armoury of carping scorn upon which you so eagerly draw. You ask me, am I opposed to primogeniture because it is a pre-eminently English custom? Let me ask you in return do you uphold drunkenness and wife-kicking because so congenial to the British temperament? It is thus no arduous task to parry one extravagance with another, and, if you are so minded, I shall be the last to decline your fencing-match. But, for the sake of our common dignity and self-respect, let us not descend to this unwholesome Billingsgate; but if we are to argue, let us argue like gentlemen and intelligent beings.

Now I feel fully confident a patient perusal of the following considerations will disabuse your mind for ever of that unhappy delusion you entertain concerning a most mischievous rule of law. I shall first call your attention to the historical bearing of our theme, from which you will see that primogeniture is in truth the offspring of a fortuitous state of circumstances, out of all harmony with the world of the nineteenth century, and having no claim to a respite of that sentence of death so long ago pronounced by the judgment of all thoughtful persons. Without entering upon the disputed question as to the precise time when the feudal system was introduced into England, it is at any rate clear that in the early Anglo-Saxon period there was no favour shown to the eldest born male. This might be partially inferred from that elective mode by which the crown

* Hallam, Mid. Ages, ch. viii. pt. iii.

was obtained, but it will be enough to rely upon the following law of Canute (No. 68):—" Sive quis incuriâ sive morte repentina fuerit intestato mortuus, dominus tamen nullam rerum suarum partem (præter eam quæ jure debetur hæreoti nomine) sibi assumito; verum eas judicio suo uxori, liberis, et cognatione proximis, juste pro suo cuique jure distribuito." So in the 75th law the lord was to make similar distribution and take no heriot when his retainer fell fighting for him in his presence.

With military tenures the descent is first limited to the eldest male line; for it is not till the reign of John we can confidently assert that socage lands were subjected to the same restriction and even then that restriction was only sub modo. At the time of the Conquest as before socage lands were divided on the death of the ancestor amongst all the children male and female equally, who thus held in a sort of gavelkind or coparcenary whichever you please. This is evident from Lex 36 of the Conqueror (Lamb. Sax. L. fol. 167):—" Si quis intestatus obierit liberi ejus hereditatem æqualiter dividant." By the reign of Henry I. females began to be excluded, the male children inheriting equally, preference being so far shown the eldest that he was allowed the best of his father's possessions—the capital messuage according to Glanville or le chief de heritage in the language of the Grand Costumier of Normandy, as appears by Lex 70 of Henry I. " Primum patris feodum primogenitus filius habeat." The next step was to restrict the whole inheritance to the eldest male, unless there was proof of an ancient custom for the males to inherit jointly:—" Si fuerit socagium antiquitus divisum" as Glanville puts it, or " si hereditas partibilis sit et ab antiquo divisa" as Bracton has it. Here are the passages in full: " Si plures reliquerit filios tunc distinguitur utrum ille fuerit miles seu per feodum militare tenens, an liber sockmannus. Quia si miles fuerit vel per militiam tenens, tunc secundum jus regni Angliæ primogenitus filius patri succedit in totum, ita quod nullus fratrum suorum partem inde de jure petere potest. Si vero fuerit liber sockmannus tunc quidem dividetur hereditas inter omnes filios quotquot sunt, per partes æquales, si *fuerit socagium et id antiquitus divisum;* salvo tamen capitali messuagio primogenito filio pro dignitate æsneciæ suæ, ita tamen quod in aliis rebus satisfaciat aliis ad valentiam. Si vero non fuerit antiquitus divisum, tunc primogenitus secundum quorundam consuetudinem totam hereditatem obtinebit; secundum autem quorundam consuetudinem postnatus filius heres est." (Glanv. lib. 7, c. 3.)

" Si liber sockmannus moriatur pluribus relictis heredibus et

particibus si hereditas partibilis sit et ab antiquo divisa quotquot erunt habeant partes suas æquales; et si unicum fuerit messuagium, illud integre remaneat primogenito, ita tamen quod alii habeant ad valetudinem de communi. Si autem hereditas non fuerit divisa ab antiquo, tunc tota remaneat primogenito. Si autem socagium fuerit villanum, tunc consuetudo loci est observanda; est enim consuetudo in quibusdam partibus quod postnatus præferatur primogenito et e contrario." (Bract. lib. ii. fol. 76.)

And again: "Sciendum autem quod si quis liberum habens socagium plures reliquerit filios, qui omnes ad hereditatem æqualiter pro æqualibus proportionibus sunt admittendi, tunc indistincte verum est quod pater eorum nihil de hereditate, vel de quæstu, si nullam habuerit hereditatem, alicui filiorum, quod excedat rationabilem partem suam, quæ ei contingit de tota hereditate paterna, donare poterit. Sed tantum donare poterit de hereditate sua pater cuilibet filiorum suorum de libero socagio in vita sua, quantum jure successionis post mortem patris idem consecutus esset de eadem hereditate." (Glanv. lib. 7, c. 1.)

These extracts seem to leave little doubt as to how socage lands descended in the reigns of Henry II. and Henry III. Still there are portions of Glanville which throw some uncertainty over the matter. Thus in lib. 13, c. 12, we find the following—"Plurimum item heredum conjunctio; mulierum scilicet in feodo militari, vel masculorum vel fœminarum in libero socagio"—so that it would seem there was equal division amongst daughters in default of sons and their issue in fees held by knight service, and the Anglo-Saxon gavelkind in lands held by common socage. However in the reign of John we have an unequivocal entry—"for in Mich. Ter. 2 John (rot. 7 in dorso) Gilbert de Bevill brought a writ of right de rationabili parte against William his elder brother for lands in Gunthorpe in Rutlandshire quæ eum contingunt de socagio quod fuit patris eorum in eadem villa. William pleaded quod socagium illud nunquam partitum fuit nec debet partiri, et hoc offert defendere. And because Gilbert the demandant produced *no* proof of the partibility, consideratum est quod Will'us *eat sine die* &c." (Robinson's Gavelkind, c. 2.)

Not long afterwards the eldest male and his descendants shut out the other issue in all cases and in all places save Kent and perhaps one or two other localities including Wales, whose ancient custom of partible division is expressly reserved by the Statutum Walliæ, 12 Edw. 1. "Dominus rex non vult quod consuetudo illa abrogetur . . . fiat partitio sicut fieri consuevit." Thus was there uniformity in the canons of descent

for freehold lands of whatsoever kind. And for what reason was this senseless innovation made? Littleton formulates a general maxim —" Item, si soient trois freres, et le mulnes frere purchace terres en fee-simple et devie sauns issue, leigne frere avera la terre per discent et nemy le puisne. Et auxi si soient trois freres et le puisne purchace terres en fee-simple et devie sans issue, leigne frere avera la terre per discent et nemy le mulnes, pur ceo que leigne est pluis digne de sank." (Lib. i. s. 5.)

" Also, if there be three brethren, and the middle brother purchaseth lands in fee simple, and die without issue, the elder brother shall have the land by descent and not the younger, &c. And also if there be three brethren, and the youngest purchase lands in fee simple, and die without issue, the eldest brother shall have the land by descent, and not the middle, for that the *eldest is most worthy of blood.*" Upon which the comment runs—" The eldest is most worthy of blood." " It is a maxim in law, that the next of the worthiest blood shall ever inherit, as the male and all descendants from him before the female, and the female of the part of the father before the male or female of the part of the mother, &c., because the female of the part of the father is of the worthiest blood. And therefore among the males the eldest brother and his posterity shall inherit lands in fee simple as heire before any younger brother, or any descending from him, because (as Littleton saith) he is *most worthy of blood.* Quod prius est dignius est, and qui prior est tempore potior est jure. Si quis plures filios habuerit, jus proprietatis primo descendit ad primogenitum, eo quod inventus est primo in rerum naturâ." Turning from these assertions we shall probably agree with Sir Matthew Hale, that the real reasons for departing from the ancient equal divisions were—1, because socage tenants wished to ape the customs of the more honourable freeholders; 2, because by constant division patrimonies became indefinitely split up and the greatness of families diminished. Thus on the worst moral and social pretexts did that unjust preference to the eldest born strike root, the evil fruits of which we have for so many generations been reaping.

I might well stop here and rest the abolition of primogeniture on that accidental origin, which has now been pointed out. But to show how hopeless is the cause you sustain I shall proceed to adduce other considerations equally damaging and destructive.

Was then primogeniture an essential ingredient of the feudal polity? Here is the reply—" It is observable that a total

exclusion of the younger sons is perhaps peculiar to England. In other countries some portion of the fief or some charge upon it is in many cases at least secured by law to the younger sons. In some places this is secured to them for their lives only; in others their descendants succeed to it. Still the eldest son in the eye of the law represents the fee. In Spain the patrimony is divided into fifteen shares. Three shares, that is a fifth of the whole, are first subtracted; afterwards four shares or a third of the remaining twelve shares. This fifth and third as they are called, are termed a *majoratus* and are at the free disposition of the parents; the remaining shares are appropriated to the children. The majoratus may be and generally is entailed upon the eldest son of the family, but a greater portion of the patrimony cannot be settled on him without leave from the Crown." (Mr. Butler's note vi. 4, 191 a, Co. Litt.) So that primogeniture as it obtains in England was not an original part of the feudal system. Hence any argument you may advance based upon the genius of that system falls to the ground.

Let me now turn to that pattern of juristic perfection the Roman law. The representative of a deceased person was either heres ab intestato or heres ex testamento. We have to do with the former alone. The order and nature of succession is thus described by Gaius, Insts. iii. 1. "Intestatorum hereditates lege XII tabularum primum ad suos heredes pertinent. Sui autem heredes existimantur liberi qui in potestate morientis fuerunt." The widow "quæ in manu morientis fuit" would also share equally with the children, "quia filiæ loco est." In default of sui heredes the inheritance passed to the agnati. "Si nullus sit suorum heredum, tunc hereditas pertinet ex eadem lege XII tabularum ad adgnatos. Vocantur autem adgnati qui legitima cognatione juncti sunt; legitima autem cognatio est ea, quæ per virilis sexus personas conjungitur." Thus brothers of the whole or half blood, if in the latter case they were related through the father, were agnati. So the uncle and nephew, child of the uncle's brother, but not the nephew or niece by the uncle's sister. In default of agnates recourse was next had to the gentiles. "Si nullus adgnatus sit, eadem lex tabularum gentiles ad hereditatem vocat." This latter kind of succession only applied in early times before the fusion of clients and patrons rendered the two classes of ingenui and non ingenui indistinguishable. In all cases cæteris paribus representatives stood in the place of their deceased ancestor—the devolution being per stirpes in the case of the sui heredes, per capita in that of the legitimi.

Such were the ancient canons of descent making no absurd

distinction between moveable and immoveable property and dealing out, compared with the English system even at the present day, far more real justice, for all unemancipated children were capable of taking in the first instance. It is true the recognition of merely civil and not natural relationship worked a certain amount of wrong; but this as well as other drawbacks were made good by the prætorian edict and by the direct legislation of the emperors. By the prætorian edict emancipated children and children given in adoption, who were sent from the adoptive family during the life of their natural father, were called (unde liberi) equally with the sui heredes properly so styled. So (unde cognati) all blood relations in the ascending, descending, or transverse line within the sixth degree. And after these (unde vir et uxor) husband and wife, for the latter of course only when there had been no in manum conventio. The prætor did not indeed make these various classes heirs but he gave them the possession of goods, quite as beneficial as the civil inheritance. By direct legislation: a constitution of Valentinian, Theodosius, and Arcadius, as amended by Justinian, admitted the descendants of daughters to the class of sui heredes with an abatement of one-third from what their mother would have taken and in full equality in the class of agnati. So the Senatusconsultum Tertullianum in the reign of Adrian admitted the mother to the succession of her children as the Senatusconsultum Orphitianum in that of Marcus Aurelius admitted children to succeed their mother. Thus did the civilians arrive at a course of distribution marked by fairness and a desire to respect natural ties. How well if we had but copied this noble exemplar! how well even now at the eleventh hour were we to appropriate the result of their labours!

You will perhaps urge that the limited operation of intestacy, the rarity of its occurrence, the universality of settlements extending beyond the life of the immediate owner render primogeniture harmless. But what a limping apology! If harmless then why not abolish a useless regulation; and how shallow not to perceive the ὕστερον πρότερον involved in such a position; for the very reason the enormous expense of settlements is incurred is to prevent the wrong the law would inflict if left to itself. The law should in the first instance be agreeable to the provisions every good husband or parent would insist on in his marriage settlement or will.

There is however an outrageous affront offered to morality when a thing wrong in itself is allowed to exist simply because it is innocuous. Is then the sacred cause of justice to be of no account? May the eternal principles of right and wrong be

utterly set at naught? Are we come to this that honesty, fair play, integrity, and upright dealing have no title of their own irrespective of their results to have their interests consulted for?

Yes, sir, you may tear up as waste paper all I have before written. On the score of justice alone there are more than enough reasons for sweeping away once and for ever that baneful and odious abuse, which, at the expense of the rest, favours one child, so improperly, so cruelly, so undeservedly.

Believe me an indignant protester against an unrighteous custom,

Your trusty friend,

Richard Roe, Esq. JOHN DOE.

BLACKACRE,
Manor of Sale.

My dear Doe,

That pedantic and rhetorical peroration you wound up with in your last epistle is not the less amusing because so entirely unexpected. You will perhaps be gratified if I take up the strain; and this I shall so far do as like all orators to begin at the close of your remarks; and thus, by undermining what is freshest and no doubt uppermost in the minds of the audience, I shall prepare, for whatever I may have to say, an attentive and gracious hearing.

With what an artillery of high-flown words and fine-sounding phrases have you stormed against the iniquity and injustice of that time-honoured institution primogeniture! With what a lavish hand have your denunciations been scattered! And yet it all comes to this—that John Doe, Esq., of Whiteacre, Manor of Dale, is out of humour with the salutary rule his ancestors have acted on for hundreds of years to the great profit of themselves and of the country they are proud to call theirs. Surely you do not mean to declare that primogeniture is legally unjust!—so glaring a contradiction in terms could never meet with assent but from a demented idiot. But, admitting that whatever the law ordains is ex vi termini legally just, you refer, I presume, to a standard not of what is but of what ought to be? Well then what is moral justice?—Justitia est constans et perpetua voluntas jus suum cuique tribuendi. This definition of the Roman lawyers will fit either legal or moral right-doing, for you recollect they got this as well as the definition of Jus—Ars boni et æqui—and their Jus Gentium—from the ethical

stores of the Greek philosophers. That being so, do pray be kind enough to point out how primogeniture conflicts with the above statement, for I am at a sore loss to perceive the repugnance.

However, I do not lay much stress upon that point: I am quite willing to try the justice or injustice of primogeniture on the argument you have so gratuitously put into my mouth. I am perfectly ready to hold that settlements afford a complete and obvious way of getting rid of any inconvenience that might arise from permitting the law to take its own course in the disposition of property, and rest assured I can well afford to smile at that victory you have so easily won by the slaying of a giant born, bred and reared no where else than in the crannies of your own fertile brain. The "harmlessness" of primogeniture and the "preposterous" remedy of settlements are simply of your own creation; for, so far from maintaining the custom to be harmless or merely indifferent, I most strenuously contend it is in the highest degree useful or positively serviceable; and, instead of deeming the rule a producing, I am full well aware it is an actively-preventing, agency in the multiplication of settlements. For why else I should inquire is there such frequent apparent carelessness about marriage articles or settlements or wills? Is it not because the owner of property does not care to be out of pocket in committing to parchment or paper that mode of devolution already traced out by the law of the land? And for what other reason is personalty so often made to follow realty as far as the different natures of freeholds and chattels will allow, but that primogeniture has an intrinsic excellence valued by Englishmen at a great price? Nay, if primogeniture were abolished to-morrow, you would have John Bull by the ears, for like a sensible being as he is he has no ambition to pay for what he already enjoys free of cost.

But look at the thing from another aspect. Most settlements and devises are drawn to accomplish some peculiar objects. Do you mean to affirm that the provisions which may be inserted to prevent land descending to the eldest son are responsible for the principal portion of the outlay? Impossible! for every one knows the stamp duty and other fees vary with the amount not with the intricacy of the dispositions of estates; and so what becomes of that extra expenditure necessitated by primogeniture, since the same money would under all circumstances be spent in carrying out the particular wishes of grantors or testators?

These observations, I apprehend, have somewhat quenched that consuming fire of eloquent passion and indignant remon-

strance with which your last despatch concluded. Were I to take you at your own request I should pass unheeded the remainder of your rather prolix communication. But I disdain an advantage that might be open to the least cavil and I shall accordingly examine the strength—I should rather say the extraordinary weakness—of the grounds from which you assume to draw a most disastrous conclusion.

That meretricious show of learning wherewith you attempt to dress up a deformed course of reasoning had better be exposed to others. To me those glassy ornaments and flaring colours are nothing but an unmitigated abomination. With what horror and anguish do I see the revered Glanville and the astute Bracton prostituted to the low purpose of upholding one long wearying fallacy, every advancing step in which becomes more egregiously false! Then again how inexcusable to debase the Roman jurisprudence to the vile end of bearing out a whimsical notion, when in fact there is and can be no real relation between the glorious civil law and that fancied paragon of succession you desire to establish in these kingdoms! It is with much reluctance I bring myself to refute the strange anachronisms into which you have headlong fallen, for your own reflexion ought to be a sufficient refutation.

Let us however ponder for a moment on the contention that primogeniture was but of accidental origin, and that that custom, resulting from knight service, ought with its fall to have simultaneously fallen. I waive such interrogatories as, whether every institution that has had a fortuitous beginning is therefore worthy of condemnation? and whether on such an assumption trial by one's peers—the twelve good men and true—the liberi et legales homines—aye, or whether parliament itself would not be placed under ban? You must not, my dear sir, seek to qualify the chance character of primogeniture by holding that when the casual circumstances, which gave it birth, had passed away, it became ipso facto an evil; for that is a petitio principii which can but serve to entangle you still more hopelessly in the meshes of an untenable supposition.

Dismissing then such introductory matters, I proceed to the grand fallacy which underlies the first portion of your remarks. In the first place then I can discover no object in all those citations from our ancient writers save and except to prove that primogeniture did not obtain in Anglo-Saxon times and should therefore find no special favour with the ardent lover of antiquity I profess myself to be. And I venture to believe you would boldly declare, as you seem tacitly to avow, that this custom was no part of the ancient common law. The ancient

common law! well and what do you understand by that? Not, I hope, the heirloom, the genuineness of the transmission of which direct from the Trojans through Brute, who came from the ruins of Ilium, to give us the name of Britains, Sir Edward Coke declined to examine in a quo warranto;* nor that shadowy stream, whose sources Sir M. Hale affirms to be as undiscoverable as those of the Nile!

You would not identify parliament with the Witenagemot! nor trial by jury with an irregular tribunal of witnessing Teutons! for, as certainly as there was no English nation before the reign of John, there was no common law before the reign of Henry II. A little research will show the innumerable discrepancies between the customs prior and subsequent to that period, and it is with reason Mr. Hallam has assigned the compilation of Glanville as the true date for the origin of our actual jurisprudence. Thus primogeniture, though not yet having the universal sway it afterwards so justly acquired, was coeval with that common law, which has enabled one civilized country of modern Europe—and about one alone—to exist without becoming a helpless dependant on the labours of the Roman jurisconsults.

In point of age, then, the devolution of freehold property claims as high a rank as any other of our rightly-esteemed municipal customs; but still as that devolution is at the present day injurious—(the untruth I admit for the sake of argument)—it must, you urge, be supplanted. Can you then supplant it without also supplanting the common law itself, of which it forms so integral a portion? When once at maturity you cannot set straight the bent elm: so do not hope to lop off an excrescence, which has grown with, and become welded into, the inmost structure of our legal organization. Do not mangle or eviscerate a part, unless your object be, not the cure, but the decay and speedy dissolution of the whole system.

A very few more words before I conclude. You have gone to some pains to let me know how the Romans distributed the property of intestates, forgetting unfortunately that on your own showing, no longer ago than in the opening of this very letter, such a comparison could have no valid application; and I perfectly agree with the correctness of your theory in this instance. For what can be more dissimilar than the antecedents and surroundings of Englishmen and Romans in the matter of land? Why, even in the outline you yourself have sketched, there is the confession of altogether local, isolated,

* Reps. Pt. III., Pref.

and gradually-moulding rules having their cause and justification in the requirements and circumstances of a people quite alien to ours! But how much more plain this becomes when we go back to the cunabula of the law of succession to deceased persons. What has the patria potestas to do with English law? Yet it was from that principle flowed the descent to the sui heredes as indeed their designation implies—quia domestici heredes sunt et vivo quoque parente quodammodo domini existimantur, unde etiam si quis intestatus mortuus sit prima causa est in successione liberorum. And upon the same principle agnatio or civil relationship depended.

How irrelevant then were those numerous quotations! Under what a hallucination have you been labouring to introduce a subject so utterly beside the expediency or inexpediency of abolishing primogeniture! May your next effort to overthrow an excellent institution be attended with as little, though, I trust for your own reputation, with less inglorious, success.

I am, with all respect,

Yours, &c.,

John Doe, Esq. RICHARD ROE.

P.S.—Let me have a line withdrawing the insulting allusion to entails.

WHITEACRE,
Manor of Dale.

Dear Richard,

A thousand thanks for the trouble you have saved me; for in the feebleness of its defence, you offer so splendid an argument for the abolition of a barbarous custom, that further effort on my part becomes superfluous.

With a consummation so devoutly to be wished, I shall approach the kindred question mentioned in your postscript with re-assured confidence.

I am grateful you have told me to what period you refer the formation of the common law and from that time alone do you begin to recognize our institutions as impressed with (one would gather from the style of your observations) an almost sacred character. Entails or gifts in the nature thereof are thus happily even in your eyes on a worse footing than primogeniture, since they certainly were not in existence in the time of Henry II. Notwithstanding the impropriety of quotation from me and its fruitlessness with you I shall take

leave to make good the above assertion with the kindly aid of the illustrious Glanville—"Potest itaque quilibet liber homo terram habens quandam partem terræ suæ cum filia sua vel cum aliqua alia qualibet muliere, dare in maritagium sive habuerit heredem sive non, velit heres vel non, imo eo et contradicente et reclamante. Quilibet etiam cuicunque voluerit potest dare quandam partem sui liberi tenementi, in remunerationem servitii sui vel loco religioso in eleemosinam ita quod si donationem illam seisina fuerit secuta, perpetuo remanebit illi cui donata fuerit terra illa et heredibus suis, si jure hereditario fuerit eis concessa." (Glanv. lib. vii. ch. i.) It is hence of no avail to inquire what might have been the ancient feudal law and the following passage would be cited by you to no purpose:—"Jus feudale non solum talliis non adversari, sed maxime eis favere constat non solum quod nullas fœminas ad successionem admittet sed multo majus, quod tenorem concessionis semper servandum jubeat, hereditatemque secundum eam deferendam." (Craig, De Jure Feudali.)

Let us however trace the history of restraint on alienation both before and after Westminster 2, by which entails properly so called were created. A glance at that history will show with what odious and despicable motives the freedom of an owner's power of disposition was interfered with.

"The establishment of the feudal law by the Normans was immediately attended with that general restraint on alienation which was a striking part of that singular policy. During the reign of William the Conqueror and his sons the doctrine of non-alienation was for various reasons very strictly enforced. The greater part of the landed property of the kingdom had been distributed amongst the Norman barons as strict and proper feuds and a considerable jealousy prevailed against all those of Saxon origin, lest they should attempt to reinstate themselves in their ancient possessions; great care was therefore taken during that period that all the vassals of the Crown who could alone be depended on in case of any insurrection should be constantly ready and able to perform their military services." Thus a paltry jealousy first played a conspicuous part in fettering estates. When the bonds were burst—by the policy of the Crown in allowing the superior lords power of disposition so that thereby their independence and strength might be diminished—by the rage for the Crusades, the outfit for which would have to be purchased from the proceeds of a sale of lands—and by the increase of agriculture and commerce—observe how again new chains were forged and with what commendable zeal the

interpreters of the law sought to unloose those fatal fastenings so obnoxious to the welfare and progress of the country.

"But in consequence of that passion so natural to all men of perpetuating their possessions in their own families, a new restraint on alienation was invented by the introduction of conditional fees, which were estates restrained to some particular heirs, exclusive of others; they were called conditional fees on account of the condition expressed or implied in the donation that if the donee died without such particular heirs the land should revert back to the donor.

"The general propensity which seems to have prevailed at that time towards a liberty of alienation, and probably a foresight of the good consequences which would thereby accrue to the community, induced the judges to construe these conditional fees in a very liberal manner: instead of declaring that estates of this kind must inevitably descend to those heirs who were particularly described in the grant according to the strict principles of the feudal law, and that no person seised of such an estate should be enabled by his alienation to defeat the succession of those who were mentioned in the gift or the lord's right of reverter; they had recourse to an ingenious device taken from the nature of a condition. It is a maxim of the common law that when a condition is once performed it is henceforth entirely gone, and the thing to which it was before annexed becomes absolute and wholly unconditional; upon this ground the judges determined that as soon as the grantee of a conditional estate had issue born his estate becomes absolute by the performance of the condition; so that it might then be aliened, charged with debts, or any other incumbrances, and forfeited for treason."

"This mode of construing conditional fees directly contravened the purposes for which they were created, and therefore the nobility, whose constant object it was to perpetuate their possessions in their own families, made a more successful attempt to obtain this end, by procuring the statute De donis conditionalibus, which enacted that when lands were given to a man and the heirs of his body, he should not have a power of alienating them, nor of defeating the succession of his own issue or of the reversioner." (Cruise, Recovs. ch. 1.)

What was the effect of this unfortunate enactment, and with what sentiments has it been regarded by the luminaries of the law? "By the statute De donis the haughty pride and hereditary independence of the nobles were established by the sacrifice of natural justice, natural affection and natural allegiance; for by this statute the tenant in tail could neither alienate his

estate nor charge it with the payment of his debts or with portions for his younger children; and by a very extraordinary construction it was even held that he could not forfeit it for high treason." (Cruise, Recovs. ch. 1) "The true policy of the common law was overturned by the statute De donis conditionalibus, 13 Edward 1, which established a general perpetuity by act of parliament for all those who had or would have it, by force whereof all the possessions in England in effect were entailed accordingly, which was the occasion and cause of the said and divers other mischiefs; and the same was attempted and endeavoured to be remedied at divers parliaments and divers bills were exhibited accordingly, (which I have seen,) but they were always, on one pretence or another, rejected. But the truth was, that the lords and commons knowing that their estates tail were not to be forfeited by fealony or treason, as their estates of inheritance were before the said act (and chiefly in the time of Henry III., in the barons' war), and finding that they were not answerable for the debts or incumbrances of their ancestors, nor did the sales, alienations or leases of their ancestors bind them for the lands which were entailed to their ancestors; they always rejected such bills, and the same continued in the residue of the reign of Edward I., and of the reigns of Edward II., Edward III., Richard II., Henry IV., Henry V., Henry VI., and till about the twelfth year of Edward IV., when the judges on consultation had among themselves resolved that an estate tail might be docked and barred by a common recovery, and that by reason of the intended recompense the common recovery was not within the restraint of the said perpetuity made by the said act of 13 Edward 1." (6 Rep. 40.b, Sir A. Mildmay's Case.)

Of the petitions presented by the commons here is an example in 17 Edward III. (Rolls of Parl. Vol. II. p. 142, No. 25). "Item que l'estatut de Westminster second soit declarer en quel degree le issue en la taille poit alienez;" to which the answer of the king was—"La ley en ce cas decea en arrere soit tenue desore." One of the great recommendations of entails was the facility they afforded for defrauding creditors and making dishonest bargains. "When all estates were fee simple, then were purchasers sure of their purchases, farmers of their leases, creditors of their debts, the king and lords had their escheats, forfeitures, wardships and other profits of their seigniories: and for these and other like cases, by the wisdome of the common law, all estates of inheritance were fee simple; and what contentions and mischiefs have crept into the quiet of the law by these fettered inheritances, dailie experience teacheth

us." (Co. Litt. 19 b.) Thus were entails more unjust in their operation than even primogeniture; and, were anything wanting to make them more detestable, the selfishness which produced and preserved them was amply sufficient. Their enormous abuses have been in some measure rectified by 33 Hen. 8, c. 39; 21 Jac. 1, c. 19, and the Bankruptcy Acts generally.

The iniquity connected with the origin of entails ought with right-thinking men to be ground enough for their immediate and utter annihilation, but there are other and more cogent considerations. In the first place a fee tail is repugnant to the genius of the law—the law, which is founded on common sense and expediency, rejecting perpetuities. We all know that theoretically no estate can be tied up for a longer period than any life or number of lives in being and twenty-one years afterwards, and a few months more under circumstances; but then in point of fact, if no disentailing assurance be executed, or if the usual expedient of re-settlement on the majority or marriage of tenant in tail be resorted to, there is all the mischief of a perpetuity. And to make the evil more complete, the most remote limitations, when remainders over on an originally well-created entail, are excepted out of the above general rule as to time of vesting; because, forsooth, any tenant in tail in possession may by a disentailing deed avoid all subsequent estates. Again, is the genius of the law set ruthlessly at nought by the statutory provision, that there shall be no merger when the fee tail and the remainder or reversion in fee meet in the same person. Thus a natural remedy so opportunely supplied is prevented from affording even its partial mitigation.

There are yet graver charges against descent per formam doni. So abtruse and technical is the learning on the subject that it is impossible for a layman to deal with entails without almost infallibly falling into some serious error. If he wishes to create a fee tail and says so in his deed in the most positive manner he will fail to effect his purpose, unless by good luck he happens to use the words of procreation "heirs of the body" after the donee's name. Nay, until the 7 Will. 4 & 1 Vict. c. 26, notwithstanding the favour shown to intention in wills, if a testator left an estate to A. and in case A. should die without issue then to B., A. was construed to have an estate tail, inasmuch as dying without issue was interpreted to mean an indefinite failure of issue. Could there be generally a more scandalous violation of the wishes of a deceased?

Suppose lands are given to a married man and to a married woman and the heirs of their two bodies: or to two husbands

and their wives and to the heirs of their bodies: or to a man and two women and the heirs of their bodies:—how shall these several limitations be understood? Surely no one but a lawyer could answer and yet the whole subject of entails is permeated with such intricacies.

Expense is another most serious objection to entails. All your sophistry cannot dispute that; for settlements are mostly drawn for no other purpose than to create such gifts and there is here no general law of the realm, as in the case of primogeniture, which will dispense with private instruments. Besides the expense of creating, there is also that of disentailing, the estate once created—no insignificant item.

That a system of property disposition, so pernicious on these manifold grounds, should be permitted to exist may well dumbfound the impartial stranger who examines our institutions, even though there were no other means whereby the selfish aggrandizement of a few families might be ministered to. But that such a system should continue when through the medium of the Statute of Uses or by the creation of trusts all the legitimate desires of owners might be sufficiently gratified ought certainly to astound ourselves. There might indeed have been some faint pretext for an upright person supporting entails when the utmost range in carving out the devolution of freeholds extended only to the creation of contingent remainders; but when by the 27 Hen. 8 the seisin was annexed to all the varied estates that might be limited through springing or shifting uses there was and is no longer any honest excuse for retaining the ill-omened statute of Westminster 2. How easy it would be to multiply ad nauseam the arguments against the outrageous mischiefs of entailed inheritances! for what a multitude of wrongs and inconveniences rise up in judgment against them.

Sir, I shall not offend you by appearing so to undervalue your mental capacity as to suppose you need further exhortation to join with me in the determination to efface the 13 Edw. 1 from the Statute Book. Apologizing then for so far trespassing and for so long detaining you,

Believe me

Your sincere well-wisher,

Richard Roe, Esq. JOHN DOE.

BLACKACRE,
Manor of Sale.

Dear Doe,

The views you advance on the subject of entail put me under a deep obligation; for, through their welcome advent, I am enabled adequately to return the compliment paid in the beginning of your note. I might go farther and say—more than adequately—since the incredible weakness of your objections has thrown a fortress round those who uphold gifts per formam doni as impregnable as Gibraltar.

It is remarkable with what anxiety you have striven to load the subject of your distaste with reproach and contumely and to dub it with all sorts of hard and disagreeable names, hoping I presume for the proverbial consequence that of the mass of dirt thrown some must necessarily stick. What a pity you do not sometimes reflect you are corresponding with a man of phlegmatic temperament, who with cross-grained unimaginativeness eschews fiction and demands fact. Fact, observe, and nothing but fact. My complaint is you have not stated the whole facts but have been guilty of a suppressio veri and still worse of a suggestio falsi. You have been very careful to insist on the sordid motives by which the brave barons of old were actuated—those disinterested heroes, who at Runnymede established the liberties and rights of the lowest impartially and equally with the highest; but you have studiously passed in silence the selfish policy of both the Norman and Plantagenet kings, who in favouring freedom of alienation were secretly diminishing the strength of those who alone could call a tyrant to account or curb the intolerable exactions and wild excesses of royal perfidy. Do you attempt to gloss over those thirty-six confirmations of the great Charter—those awful imprecations on the head of him who should violate its enactments—or that protracted struggle which saw the first summoning of the Commons under the glorious auspices of Simon de Montfort? And are you so innocent, as to credit the judges of the Middle Ages with an economical wisdom which the combined labours of Adam Smith, M. Say, Sismondi, Malthus, Chalmers, Ricardo, and the Mills have not even yet succeeded in thoroughly disseminating? Or so blind, as not to recognize in that specious judicial foresight honour bartered for place and beliefs surrendered for reward? Or so foolish, as to set the isolated opinions of a few stray writers against that current of authority and popular tradition, which attributes the Statute of Fines to the cunning and cupidity of Henry VII.; for common recoveries

being only available when the donee in tail was in possession or when the immediate tenant of the freehold joined in the transaction were not enough to satisfy that greedy rapacity, which must needs cut off all expectancies in remainder. Thus by the magnanimous exertions of pliable judges, by the folly of parliament, and by the simplicity of the people, the safeguard against usurpation so sagaciously provided by Westminster 2 was gradually weakened until by the slaughter for treason of the few remaining nobles, who survived the Wars of the Roses and who had never unfettered their estates, no bulwark was left and the Tudors towered in barbaric majesty over a nation of slaves.

Nothing daunted you have again, I perceive, indulged in extensive quotation, which I am very pleased to find is, so far as relevant, suggestive of some of the very best arguments for entails. It is most true as you observe that restriction on alienation prevailed amongst the feudists; nor should I show myself so poor a disciple as to philosophize on the benefits, which arose from a particular cause amongst a single or a few alien peoples. But when that cause is a custom adopted not by one but by an innumerable number of nations having no connexion with each other there must be some singular advantage attending its observance; and that this is the case with restriction on alienation in some form or another the following extracts will sufficiently demonstrate:

"And first, touching the laws of succession, as well of descent of inheritances of lands, as also of goods and chattels; which, among the Jews, was the same in both.

"Mr. Selden, in his book De Successionibus apud Hebræos, has given us an excellent account, as well out of the holy texts, as out of the comments of the rabbins, or Jewish lawyers, touching the same; which you may see at large in the fifth, sixth, seventh, twelfth and thirteenth chapters of that book; and which, for so much thereof as concerns my present purpose, I shall briefly comprise under the eight following heads, viz.:

"First, that in the descending line, the descent or succession, was to all the sons; only the eldest son had a double portion to any one of the rest; if there were three sons, the estate was to be divided into four parts, of which the eldest was to have two fourth parts, and the other two sons were to have one fourth part each.

"Secondly, if the son died in his father's lifetime, then the grandson, and so in infinitum, succeeded in the portion of his father, as if his father had been in possession of it, according to the jus representationis now in use here.

" Thirdly, the daughter did not succeed in the inheritance of the father, as long as there were sons, or any descendants from sons in being; but if any of the sons died in the lifetime of his father having daughters, but without sons, the daughters succeeded in his part, as if he himself had been possessed.

" Fourthly, and in case the father left only daughters and no sons, the daughters equally succeed to their father, as in co-partnership, without any prelation, or preference, of the eldest daughter, to two parts, or a double portion.

" Fifthly, but if the son had purchased an inheritance, and died without issue, leaving a father and brothers, the inheritance of such son so dying, did not descend to the brothers;—unless in case of the next brother taking to wife the deceased's widow, to raise up children to his deceased brother;—but in such case, the father inherited to such son entirely.

" Sixthly, but if the father in that case was dead, then it came to the brothers, as it were, as heirs to the father, in the same manner as if the father had been actually possessed thereof; and therefore the father's other sons, and their descendants in infinitum, succeeded; but yet especially, and without any double portion to the eldest: because though in truth the brothers succeeded, as it were in right of representation from the father, yet if the father died before the son, the descent was de facto immediately from the brother deceased, to the other brothers, in which case their law gave not a double portion: and in case the father had no sons, or descendants from them, then it descended to all the sisters.

" Seventhly, if the son died without issue, and his father, or any descendants from him, were extant, it went not to the grandfather or his other descendants. But if the father was dead without issue, then it descended to the grandfather. And if he were dead, then it went to his sons and their descendants; and for want of them, then to his daughters or their descendants;—as if the grandfather himself had been actually possessed, and had died, and so mutatis mutandis to the proavus, abavus, atavus, &c. and their descendants.

" Eighthly, but the inheritance of the son never resorted to the mother, or to any of her ancestors; but both she and they were totally excluded from the succession.

" The double portion, therefore, that was jus primogenituræ, never took place but in that person that was the primogenitus of him from whom the inheritance immediately descended, or him that represented him. As if A. had two sons, B. and C. —and B. the eldest had two sons, D. and E.—and then B. died;—whereas B. should have had a double portion, viz. two

thirds in case he had survived his father,—but now this double portion shall be equally divided between D. and E.—and D. shall not have two thirds of the two thirds that descended from A. to them." (Sir M. Hale, Common Law.)

The Hebrew course of descent being thus explained, let us see how far alienation could interrupt the devolution. And first as to wills and testaments. An express declaration to that effect was not of itself sufficient to disinherit the legal representative or representatives in the succession.

"Ita ex lege sacra liberi heredes erant, ut nuda exhæredationis formula hæreditas eis præcludi nequiret. Si igitur pater pronunciarat sive verbo, sive scriptis, Filius meus exhæres N. esto inter fratres suos, plane irritum erat. Quod itidem dicendum de ejusmodi pronunciato de filiabus, fratribus, duplici primogeniti sorte. . . .

The institution of any but a legal heir was invalid. Quin si quis alius præter aliquem ex eis, qui ex lege heredes sunt, instituatur heres, irrita est hujusmodi institutio. Atque huc trahunt illud Proverb. xi. 17, Qui turbat propinquum suum est crudelis.

A disinheriting clause was operative if one of the legal heirs was at the same time instituted—but this only when the testator was on the point of death or sick. At si exheredationis formula ejusmodi sit, ut simul accedat institutio heredis qui ex eis fuerit qui ex lege heredes sunt, eam valere volunt si fiat a *moribundo* seu *ægroto;* minime vero si ab eo qui *corpore* est *sano*. . . . . Veluti si cui tres sint filii, Simeon, Reuben, Levi, is moribundus seu ægrotus testamento. . . . . instituat heredem hac verborum formula, Reuben filius meus heres mihi esto ante omnes filios meos, aut succedat mihi solus: cæteri hac institutione rite satis exheredes fiunt. Nam fas esse heredes pro libitu ita instituere, ex eis qui ex lege coheredes forent, eliciunt ex illo Deut. xxi. 16. "Adveneritque dies, quo divisurus est hereditatem filiis suis," ac si heredum, modo ex filiis illis seu liberis sumpti siut, institutio libera patri permitteretur. Quod etiam ad fratres extendunt. . . . . Nemo potest alium instituere, præter eum qui ex eis est, ad quos hereditas jure communi spectat; nec hereditatem ab herede funditus tollere. Nempe ad eum, qui heres omnino non est, transferre. Id quod intelligendum est nomine hereditatis.

Disinheritance might be indirectly effected by alienation by way of gift—only that if the gift were to one of the sons he would be a trustee for the shares of his brethren, becoming an absolute owner for his own proportionate share alone. Atqui nomine donationis licitum habebatur domino, sive sano corpore,

sive ægroto, libere patrimonium quodcunque alienare, atque ita per consequens etiam liberos exhæredare. Nimirum unicuique facultas est substantiam suam donatione transferre, cuicunque voluerit . . . . Verum si filiorum alicui non institutione (ut dictum est) sed donationis instrumento donaverat pater totam substantiam suam, donatio ea non aliter valuerat, quam ut is cæterorum partes possideret velut curator, tutor seu ἐπίτροπος, suam tantum ut dominus.

The freedom of alienation, however, by way of gift was but very partial, inasmuch as by the law of redemption and the effect of the jubilee property so passed reverted to the donor or his heirs. Thus if the gift were of indefinite duration the donee or his privies could at most enjoy but for fifty years—and the same rule applied where brethren held in common according to agreement. But if the gift were for a given number of years the enjoyment would be for that period unaffected by the jubilee. Quæ vero dicta sunt de libera alienatione, temperantur et modum recipiunt tunc ex lege redimendi tunc ex Jubilæorum, seu anni quinquagesimi, lege lata Levitic. xxv. 10, atque aliis eodem capite. Atque inde intelligendus Diodorus Siculus, lib. xl. ubi nefas apud Judæos fuisse ait τοὺς ἰδίους χλήρους πωλεῖν, seu hereditates suas vendere. Scilicet vendere fundum in excisionem, id est, ut a venditore ejusque posteris perpetuo excidatur, seu εἰς βεβαίωσιν, ut Hellenistæ, sive alienatione nunquam rescindenda, fas non erat ex lege dicto Levitici capite, comm. 23. Adeo ut Jubilæo quolibet redire deberent alienati fundi ad primos dominos seu heredes eorum, idque quotcunque intervenirent alienationes mediæ. Quod item de donationibus intelligunt, et de hereditatibus in solidum ex pacto a fratribus aliisve coheredibus possessis. Integrum nempe erat Jubiælo familiæ erciscundæ actione denuo uti. Consule item Ezech. xlvi. 17. Ad successionibus autem transmissa lex ista non spectat. Atque de alienationibus simpliciter tantum, nullo tempore adjecto, factis hæc capienda. Etenim si in sexaginta, verbi gratia, annos (sine dolo malo) quis fundum emisset, Jubilæo, qui citra temporis adjecti finem interveniret, restitutio venditori aut heredibus ejus non fiebat."—Selden.

The only remaining mode in which heirs could be disinherited was by a consecration of the patrimony to sacred purposes.

Turning now to the ancient Greeks, Sir M. Hale thus cites Petit's Leges Atticæ, cap. vii. tit. 6. "Omnes legitimi filii hereditatem paternam ex æquo inter se hæriscunto, si quis intestatus moritur relictis filiabus qui eas in uxores ducunt heredes

sunto, si nullæ supersint, hi ab intestato hæreditatem cernunto: et primo quidem fratres defuncti Germani, et legitimi fratrum filii hæreditatem simul adeunto; si nulli fratres aut fratrum filii supersint, iis geniti eadem lege hæreditatem cernunto; masculi autem iis geniti etiam si remotiori cognationis sint gradu, præferuntor, si nulli supersint, paterni proximi, ad sobrinorum usque filios, materni defuncti propinqui simili lege hæreditatem adeunto; et e neutra cognatione supersint intra definitum gradum proximus cognatus paternus, addito notho nothave; superstite legitima filia nothus hæreditatem patris ne addito."

"This law is very obscure. The sense thereof seems to be briefly this; that all the sons equally shall inherit to the father; but if he have no sons, then the husbands of the daughters; and if he have no children, then his brothers and their children; and if none, then his next kindred on the part of his father, preferring the males before the females; and if none of the father's line, ad sobrinorum usque filios, then to descend to the mother's line."

The obscurity and defects both of the quotation and the comment "induced Sir William Jones, the ablest linguist of his age and nation, to publish a translation of the 'Speeches of Isæus, in Causes concerning the Law of Succession to Property at Athens.'" From this ingenious work I have selected the following Attic laws:—

"All genuine, unadopted citizens may devise their estates as they think fit, provided that they have no legitimate children and be not disabled by lunacy, or age, or poison, or disease; nor influenced by women, so as to have lost their reason from any of these causes; nor be under any duress or confinement.

"The wills of such as have legitimate sons shall stand good, if those sons die before their age of sixteen years.

"If a man have legitimate daughters, he may devise his estate as he pleases, on the condition that the devisees take them in marriage.

"Adopted sons shall not devise the property acquired by adoption; but if they have legitimate sons, they may return to their natural family. If they do not return, the estates shall go to the heirs of the persons who adopted them.

"The adopted son and the after-born sons of the person who adopted him, shall be coheirs of the estate; but no adoption by a man who has legitimate sons then born, shall be valid.

"If a citizen die intestate and leave daughters, the nearest kinsmen who marry them shall inherit the estate; but if he die childless, his brothers by the same father shall be his heirs, and the legitimate sons of those brothers shall succeed to the share

of their fathers. If there be no brothers, the sisters on the father's side, and their children shall inherit. On failure of sisters and nephews, the cousins on the father's side shall be heirs in the same manner; but males and the children of males shall be preferred, although in a remoter degree, provided they belong to the same branch. If there be no kinsman on the father's side so near as the second cousin, then let those on the mother's side succeed to the estate in the same order. Should there be no maternal kinsmen, within the degree above limited, the next paternal kinsmen shall be the heirs.

"No male or female bastard, born after the archonship of Euclid, shall succeed either to sacred or civil rights."

The Athenians made no difference between the transmission of real and personal property. In these laws, therefore, the words *devise, heir, inheritance,* and the like, are applied both to lands and to goods, without being restrained to the peculiar sense in which we use them.

To the above description it may be added, "That the owner had power to alienate his property during his lifetime, and that such alienation was valid in point of law, both against the heir and all the rest of the world, is beyond a doubt. There was, however, an ancient law, which punished with degradation (ἀτιμία) a man who had wasted his patrimony (τὰ πατρῷα κατεδηδοκώς)—

"The bulk of the estate being left to the son, legacies might be given to friends and relations, especially to those who performed the office of our executor or testamentary guardian." . . . "It was only when a man had no issue that he was at full liberty to appoint an heir. His house and heritage were then considered desolate (ἔρημος καὶ ἀνώνυμος), a great misfortune in the eyes of an Athenian; for every head of a family was anxious to transmit his name and religious usages to posterity. The same feeling prevailed among the Greeks in more ancient times. We learn from Hesychius and the Etymol. Mag. that distant relations were called χηρωσταί, because when they inherited, the house was χηρεύων καὶ ἔρημος. (See Hom. Il. v. 158; Hes. Theog. 607.) To obviate this misfortune, an Athenian had two courses open to him. Either he might bequeath his property by will, or he might adopt a son in his lifetime." (Smith's Greek and Roman Antiquities, title "Heres.")

"With respect to the Roman law, we have already had occasion to notice its simplicity, in the inheritance of property, as it was settled by the Trebellian and Pegasian decrees, and its alteration, in this respect, by the introduction of the fidei-commissa. These gave rise to successive fidei-commissary

substitutions. By multiplying these, and by prohibiting each substitute from aliening the inheritance, property was absolutely taken out of commerce, and fixed, in a settled and invariable course of devolution, in particular families. There is reason to suppose this mode of settling property was never common, and the policy of Justinian soon interfered to check it. By the 159th Novel, he restrained fidei-commissary substitutions to four degrees, including the party himself, who instituted the substitution. With the third substitute, therefore, the power of the testator expired, the absolute dominion vesting absolutely in him. This in some measure restored the law to its primitive simplicity. A similar progress is discoverable in the history of French substitutions. The law of France appears to have generally admitted perpetual substitutions. The ordonnance of Orleans, in 1560, restrained them to two degrees, exclusive of the instituant. That ordonnance not having a retrospective operation, and the inconvenience arising from prior substitutions being greatly felt, the ordonnance of Moulins, in 1566, restrained all substitutions, anterior to the ordonnance of Orleans, to the fourth degree of the instituant. The ordonnance of 1747 fixed the law on this important branch of real property. It was framed with great deliberation by the chancellor d'Aguessau, after taking the sentiments of every parliament in the kingdom, upon forty-five different questions proposed to them on the subject. These questions, and the answers of the parliaments, have been published under the Questions concernant les Substitutions, Toulouse, 1770. The ordonnance of 1747 confined substitutions, with some exceptions, to two degrees, and directed the degrees to be computed, by the individuals, in whom the substitution vested. Upon this, it was held, that if the testator appointed several persons, jointly, to the inheritance, they formed, together, but one degree; if he appointed it to several persons successively, though in the same degree of kindred, as brothers or sisters, each person in whom the succession vested, formed one degree. The mode of settlement used in Spain, by what is termed a majoratus, has been already noticed.

"In Germany, the restraints imposed by the feudal law, on the alienation of property confined by the original investiture, to a particular channel of descent, still prevail; so that the same intricate entails subsist with them, as with us; without those modes of eluding them which the laws of England have sanctioned.

"The tailzies or entails of Scotland appear still more intricate. The least restrictive of these is called a simple destination.

It is defeasible and attachable by creditors, so that it amounts to no more than a designation who is to succeed to the estate, in case the temporary possessor neither disposes of it, nor charges it. The next degree of tailzie, is a tailzie with prohibitory clauses. The proprietor of an estate of this nature cannot convey it gratuitously, but he may dispose of it for onerous causes, and it may be attached by creditors. The substitutes, however, as creditors by virtue of the prohibitory clause, may by a process in Scotland, termed an inhibition, secure themselves against future debts or contracts. The third and strictest degree of tailzie, is a tailzie guarded with irritant and resolutive clauses. This is a complete bar to every species of alienation, voluntary or involuntary. The efficacy of these clauses, both against the heir, and the creditors of the tenant in tail, aliening, was established in 1662, by a solemn decision of the judges of Scotland, in the case of the Viscount Stormont against the creditors of the Earl of Annandale; and that decision was sanctioned by a statute of the Scottish parliament in 1685. This mode of entail appears to be greatly discouraged by the judicature of the country; and the modes of eluding it have been discovered, and allowed in their courts of justice." (Co. Litt. 191 a, Mr. Butler's note vi. 7.)

As to the Roman law it may be observed there were two modes by which a testator might tie up property. These were: I. Pupillar and quasi-pupillar substitutions. II. Fideicommissary dispositions, of which the following passages give an account:—"Liberis suis impuberibus quos in potestate quis habet, non solum ita ut supra diximus substituere potest, id est, ut si heredes ei non extiterint alius ei sit heres; sed eo amplius, ut et si heredes ei extiterint et adhuc impuberes mortui fuerint, sit eis aliquis heres: veluti si quis dicat hoc modo: Titius filius meus heres mihi esto; et si filius meus heres mihi non erit, sive heres mihi erit et prius moriatur quam in suam tutelam venerit (id est, pubes factus sit), tunc Seius heres esto. Quo casu siquidem non extiterit heres filius, tunc substitutus patri fit heres; si vero extiterit heres filius et ante pubertatem decesserit, ipsi filio fit heres substitutus. Nam moribus institutum est ut, cum ejus ætatis filii sint, in qua ipsi sibi testamentum facere non possunt, parentes eis faciant.

"Qua ratione excitati, etiam constitutionem posuimus in nostro codice, qua prospectum est ut, si mente captos habeant filios vel nepotes vel pronepotes cujuscumque sexus vel gradus, liceat eis, et si puberes sint, ad exemplum pupillaris substitutionis certas personas substituere: sin autem resipuerint, eamdem substitutionem infirmari, et hoc ad exemplum pupil-

laris substitutionis, quæ postquam pupillus adoleverit, infirmatur (Insts. ii. tit. 16).

"Sciendum itaque est omnia fideicommissa primis temporibus infirma esse, quia nemo invitus cogebatur præstare id de quo rogatus erat. Quibus enim non poterant hereditatem vel legata relinquere, si relinquebant, fidei committebant eorum qui capere ex testamento poterant. Et ideo fideicommissa appellata sunt, quia nullo vinculo juris, sed tantum pudore eorum qui rogebantur, continebantur. Postea divus Augustus semel iterumque, gratia personarum motus, vel quia per ipsius salutem rogatus quis diceretur, aut ob insignem quorundam perfidiam, jussit consulibus auctoritatem suam interponere. Quod, quia justum videbatur et populare erat, paulatim conversum est in assiduam jurisdictionem; tantusque eorum favor factus est, ut paulatim etiam prætor proprius crearetur, qui de fideicommissis jus diceret, quem fideicommissarium appellabant.

"In primis igitur sciendum est, opus esse ut aliquis recto jure testamento heres instituatur, ejusque fidei committatur ut eam hereditatem alii restituat: alioquin inutile est testamentum, in quo nemo heres instituitur. Cum igitur aliquis scripserit: Lucius Titius heres esto, poterit adjicere: Rogo te, Luci Titi, ut cum primum possis hereditatem meam adire, eam Gaio Seio reddas, restituas. Potest autem quis et de parte restituenda heredem rogare, et liberum est vel pure vel sub conditione relinquere fideicommissum, vel ex certo die.

"Eum quoque cui aliquid restituitur potest rogare ut id rursum alii, aut totum aut pro parte, vel etiam aliquid aliud restituat." (Insts. Lib. ii. tit. 23.)

Besides the restriction imposed by the voluntary act of an owner, the free alienation of property was also restrained by the law which prohibited inofficious wills. The following passage contains provisions upon this subject:—"Quia plerumque parentes sine causa liberos suos exheredant vel omittunt inductum est ut de inofficioso agere possint liberi, qui queruntur aut inique se exheredatos, aut inique præteritos: hoc colore, quasi non sanæ mentis fuerint cum testamentum ordinarint. Sed hoc dicitur non quasi vere furiosus sit, sed recte quidem fecerit testamentum, non autem ex officio pietatis" (Insts. ii. tit. 18).

As to France:—"Gifts *inter vivos* or by *will* must not, when there is only one legitimate child at the death, exceed one-half of the owner's property; they must not exceed a third when there are two children; nor more than a fourth, when there are three or more. This rule applies to descendants in whatever degree, who only take the place of the person they represent in the succession of the donor or testator.

" Gifts inter vivos or by will must not exceed the half of the owner's property if, having no children, he leaves one or more ascendants in both the paternal and maternal lines; three-fourths, if he leaves ascendants only in one line. In default of ascendants and descendants, an owner may dispose of the whole of his property by gift or by will." (The Civil Laws of France, by D. M. Aird, Esq., ch. iv., bk. iii.)

In Germany the restrictions on alienation are by (1) Fideicommissa; (2) By other institutions; (3) By influence of indefeasible heritages. Under the second of these categories is included restrictions: (1°) From hereditary estates (" Stammgüter) which descend in infinitum lineally, though the customary entail may be barred by agreement of the occupant with the next heir or by sale when the occupant is hard pressed, an offer to sell being first made to the next heir. So the last descendant of an exhausted stock may dispose of the property as he pleases; (2°) From fiefs; (3°) From common rights in property (" Gutteremgeinschaft "), which come " into operation on the occurrence of marriage in various forms and shapes according to the province." It includes the right of the husband to a share in the wife's lands, and the right of the wife to a share in the husband's lands, and is correspondent, therefore, as to the rights of dower and of curtesy respectively in the English law; but is by no means correspondent as to the shares to those rights of the English law; (4°) From customs of the estate which have the force of law.

3. As to indefeasible heritages. " The common law requires that parents should leave their children, and that children who die without descendants should likewise leave their parents a fixed quota of their property." (Rep. Roy. Comm. on Land Tenures, 1869.)

" In Portugal, the law regulating the descent and division of landed property on the death of the owner is as follows:—

(a.) Where the owner dies intestate, or where, having made a will, the will is annulled or becomes void, the estates descend to his lawful heirs in the following order:—

1. Lineal descendants.
2. Lineal ancestors.
3. Brothers and sisters and their issue.
4. Surviving husband or wife.
5. Collaterals not included in No. 3 to the tenth degree.
6. The state.

Relatives in the same degree take equal shares of the

inheritance without respect of sexes; and a relative in a nearer degree excludes a relative in a more remote degree.

(b.) Where the owner dies having made a will, and leaving lineal descendants or lineal ancestors, two-thirds of the estate descend absolutely to his lawful heirs, as the whole would have done if he had died intestate, and in the same order; as does also such portion of the remaining third as may not have been disposed of by will of the owner, in accordance with his legal right to dispose of this third.

(c.) Where the owner is married, and the marriage has been entered into without a settlement, the law gives one-half of the estate to the survivor of the marriage for life, and the other half goes to the lawful heirs; and husband and wife have each the power of disposing by will of one-third of their real property. But on the death of the survivor, the children or other lawful heirs are absolutely entitled to take per capita or per stirpes, as the case may be, the other two-thirds which they take in equal shares.

"Danish estates of the old type bear an apparent likeness to the manors of our Domesday Book. Whereas the Norman and (under other names) the Saxon, manor, was divided into (1) demesne and (2) tenemental lands, the Danish 'sædegaard,' or family seat, consists of (1) 'hovedgaard,' or demesne round the mansion, and (2) the 'bönder gods,' or portion occupied by small farmers. Between the demesne or tenemental land the law has drawn a fast line, keeping the two species of property rigorously apart by ascribing to each separate rights and obligations. The 'iord-drot,' or lord of an unentailed estate, may sell his lease or demesne as he thinks fit. But his proprietary rights over the tenemental lands are so conditioned as to give the occupants a kind of joint ownership in the surface of the soil. According to the Code 1683 of Christian V., the Danish Justinian, a family seat should lie near or amid tenemental farms rated in all at 200 'tönder' of 'hard corn,' say 2,000 acres. . . . . A 'sædegaard' may be a freehold in fee-simple (I use this expression as the nearest English equivalent), or an estate in tail. If entailed, it may belong to the 'stamhuse,' or to the fiefs. The 'stamhuse' correspond in part with our own entailed estates. As the Danish law knows no 'fine and recovery' the entail cannot be legally barred. But the Crown has in some cases allowed the conversion of such estates into money trusts and in others

removed the entail. The lands, as well as any personal property tied up with them by the fidei-commissary band, must descend in perpetuity as a family possession, to be enjoyed after the manner indicated by the founder's deed. The usufruct commonly follows the rule of primogeniture. The fiefs (2), or estates of the counts and barons (thirty-two in number), have all been created since the establishment of the absolute government in 1660. They enjoy certain privileges, legal and other, and descend by primogeniture. On failure of the line they revert to the Crown.

"The Constitution of 1849 forbids the erection of fresh entails, and promises that estates of this class shall be converted into free property. No bill has yet been passed in such a sense. The government exercises a certain control over entailed estates, taking care that the usufruct is held according to the founder's intentions. By a recent law the tenemental lands of entailed estates may, in a way prescribed, be converted into trust moneys.

"No estate in Denmark, large or small, can be parcelled without permission from the minister of the interior. The strict rule is, that when a 'gaard' is broken up there must be reserved one lot of at least twenty-five acres of first-class land. Farms of less than twenty-five acres may not be subdivided, except under very special circumstances; one lot of ten to twelve acres must always be reserved. When demesne is subdivided, there must be told off for separate sale or occupation, as many lots of eighty acres as the feudal owner owed knight-horses for military service. For building, lots of two acres may be detached from an estate, and any lot, however small, may be cut from a farm when the intention is to cede it to the owner of a contiguous property, or to annex it to a house which has no land. Before a motion for the so-called 'udstykning' can be lodged at all, a number of formalities have to be gone through, amongst which I may notice the preparation of a map of the ground to show the exact nature of the division proposed. This is insisted on as a precaution against the parcelling being done in strips, and to ensure a division into squares or other suitable shapes of ground.

"It should be unnecessary to remark that these rules do not bear on the life-leasehold farm. Neither do they apply to the 'housemen,' whose small lots may, in a general way, be subdivided ad libitum.

"As the requisite formalities are rather expensive, their existence acts as a slight check on sub-division. The right of accumulation is at present so free that it may be described as unlimited.

"A testator may, in general, dispose of one-third of his entire property, real or personal, the remainder being of necessity distributed in equal portions, to the heirs, male and female, of his body. This rule secures to each heir two-thirds, for certain, of the lot due to him as ab intestato, the division where there is no will, being in equal shares.

"If the Danish law has done so much for the creation of peasant freeholds, it has also recognized as a desirable object that large estates be kept in single hands, and in the families of their original possessors. The owner of an unentailed 'sædegaard' may leave half his property to any of his heirs, in which case he can freely dispose of one-fourth (indeed, of one-third) of the rest of his estate, the remaining three-fourths following the common rule of inheritance. But the favoured heir must, nevertheless, give the other claimants compensation reckoned on the usual foot. Again, if the proprietor of a 'sædegaard' die intestate, the sons may reserve his real estate, on condition that they give their sisters, if any, full money compensation for the lands of which the brothers have deprived them. In the island of Bornholm a singular customary law of inheritance prevails. The youngest son, on compensating the other children, may take the estate.

"The owner of a freehold 'bondergaard,' be he of the peasant class or not, may leave his property according to a special set of rules, from which I am content to extract the chief circumstances. These are—

1. If a 'bonde' have no heirs of his body he may leave his estate (animals, tools, &c. inclusive) away as he pleases.
2. He may leave all to any one of his heirs without restriction as to sex.
3. He may fix the compensation to be given by the favoured individual to the defined heirs.
4. A testator who favours a single heir (rule 2) can only bequeath ad libitum, one-eighth of his entire property, real estate included.
5. The owner of two or more farms may not make a cumulative bequest.

"These provisions are crossed by checks and counter-checks connected with the wife's right to control her husband's testamentary dispositions in cases of communion of property."

I might easily multiply instances of restriction on alienation from other countries; but the foregoing enumeration sufficiently proves the universality of permitting property to be fettered. In that universality recognize the justification of our entails,

which possess so many advantages over most of the methods of restriction elsewhere in vogue.

Let me next pass to some of those trivialities which even your diffuseness could not dilate upon. You stand up for the genius of the law, which is opposed to perpetuities, and which it also appears merges a less in a greater estate when they centre in the same individual in the same right. Good! but are entails perpetuities or have been for the last four centuries? Why have you not given in the same breath, when you speak of disentailing assurances, the strongest demonstration to the contrary? Yet to put the matter beyond controversy let us consider the example of a perpetuity given by Littleton.

"Item, jeo ay oye dit, que en temps le Roy Richard le Second, il y fuist un Justice de le Comen Banc, demurrant en Kent, appele Rykill, qui avoit issue divers fitz, et son entent fuist, que son eisne fitz averoit certeyn terres et tenementes a luy et a les heires de son corps engendres, et pur defaute dissue, le remeyndre a le second fitz, &c., et issint a le tierce fitz, &c., et pur ceo quil voille que nul de ses fitz alieneroit ou ferroit garrauntie pur barrer ou leder les autres queux serront en le remeyndre, &c., il fist faire tiel endenture a tiel effecte, scil. que les terres et tenementes furent dones a son eisne fitz sur tiel condicion, que si leisne fitz alienast en fee, ou en fee-taille, &c., ou si ascun de ses fitz alienast, &c., que adonques lour estate cessera et serroit voyde, et que adonques mesmes les terres et tenementes immediate remeyndront a le second fitz, et a les heires de son corps engendres, &c., sur mesme la condicion, scil. que si le ij. fitz alienast, &c., que adonques son estate cessera, et que adonques mesmes les terres et tenementes immediat remeyndront al tierce fitz et a les heires de son corps engendres, et *sic ultra*, le remeyndre as autres de ses fitz, et lyverë de seisin fuist fait accordant.

"Mes il semble per reason, que toutes tielx remeyndres en la fourme avauntdit faitez, sount voides et de nul value, et ceo pur trois causes. Une cause est, pur ceo que chescun remeyndre que commence per un fait, il covient que le remeyndre soit en luy a qui le remeyndre est taillé per force de mesme le fait, quant le lyverë de seisin est fait a luy qui avera le franke-tenement, qar en tiel cas le nessance et le estre de le remeyndre est per le lyverë de seisin a celuy qui avera le franktenement, et tiel remeyndre ne fuist al second fitz al temps de lyverë de seisin en le cas avauntdit, &c.

"La seconde cause est, si le premier fitz alienast les tenementes en fee, donques est le franktenement et le fee-simple en laliené,

et en nul autre; et si le donour avoit ascun revercion per tiel alienacion, la revercion est discontinué: donques coment per ascun reason poet estre, que tiel remeyndre commencera son estre et sa nessance immediate apres tiel alienacion fait a un estraunge, qui ad per mesme lalienacion franktenement et fee-simple? et auxi si tiel remeyndre serroit bon, adonques purroit il entrer sur laliené, lou il navoit ascun manere de droit avant lalienacion, que serroit inconvenient.

"La tierce cause est, quant la condicion est tiel, que si leisne fits alienast, &c., que son estate cessera ou serroit voyde, &c., donques apres tiel alienacion, &c., poet le donour entrer per force de tiel condicion, &c., come il semble, et issint le donour et ses heires en tiel cas doient pluis tost aver la terre que le second fitz, qui navoit ascun droit devant tiel alienacion, &c., et issint il semble que tielx remeyndres en le cas avauntdit sont voydes, &c."

"Also, I have heard say, that in the time of King Richard the Second, there was a justice of the common place, dwelling in Kent, called Richel, who had issue divers sonnes, and his intent was, that his eldest sonne should have certaine lands and tenements to him, and to the heires of his bodie begotten; and for default of issue, the remainder to the second sonne, &c., and so to the third sonne, &c., and because he would that none of his sons should alien, or make warrantie to bar or hurt the others that should be in the remainder, &c. he causeth an indenture to be made to this effect, viz. that the lands and tenements were given to his eldest son upon such condition, that if the eldest son alien in fee, or in fee taile, &c. or if any of his sons alien, &c., that then their estate should cease and be void, and that then the same lands and tenements immediately should remain to the second son, and to the heires of his body begotten, et sic ultra, the remainder to his other sonnes, and livery of seisin was made accordingly.

"But it seemeth by reason, that all such remainders in the forme aforesaid are void and of no value, and that for three causes. One cause is, for that every remainder which beginneth by a deed, it behoveth that the remainder be in him to whom the remainder is entailed by force of the same deed, before the livery of seisin is made to him which shall have the freehold; for in such case the growing and the being of the remainder is by the livery of seisin to him that shall have the freehold, and such remainder was not to the second sonne at the time of the livery of seisin in the case aforesaid, &c.

"The second cause is, if the first son alien the tenements in fee, then is the freehold and the fee simple in the alienee, and in

none other; and if the donor had any reversion, by such alienation the reversion is discontinued: then how by any reason may it be that such remainder shall commence his being and his growing immediately after such alienation made to a stranger, that hath by the same alienation a freehold and fee simple, &c.? And also if such remainder should bee good, then might hee enter upon the alienee, where he had no manner of right before the alienation, which should bee inconvenient.

"The third cause is, when the condition is such, that if the elder sonne alien, &c. that his estate shall cease or bee void, &c. then after such alienation, &c. may the donor enter by force of such condition, as it seemeth, and so the donor or his heires in such case ought sooner to have the land than the second sonne, that had not any right before such alienation; and so it seemeth that such remainders in the case aforesayd are void." (Lib. iii. c. 13, ss. 720—723.)

I do not ask how far entails are subject to the objections pointed out in the foregoing sections, which treat of a very particular case; but I do ask how far entails conflict with the general principles of the law, which is so repugnant to perpetuities that the attempt even of a learned judge to tie up his property indefinitely resulted in a series of blunders that have called down so severe a criticism from the respectful Littleton, and the still severer reprimands of his commentator. So much for the charge that an entail is in the nature of a perpetuity.

Then with what propriety the ordinary rule of merger is prevented from sinking a fee tail in the fee simple expectant! By this wholesome exception resettlement is sometimes rendered unnecessary, testamentary disposition becomes optional, and the wishes of the original donor are carried out.

You have again harped upon expense. Niggardly things to the niggardly mind! Do you begrudge paying a high rent for the broad fields of Whiteacre? or for a box at the opera? Do you vainly fumble for your purse when a work of art or other esteemed production is brought to the hammer? So you cannot expect so valuable a treasure as devolution by entail to be had for nothing.

I regret you should have committed so great a blunder as to propose to substitute the instrumentality of the Statute of Uses for that of the De donis. In making this proposal you have acted against your better knowledge, for you are full well informed that it is the attribute of intelligence never to use complex when simple means are adequate to the accomplishment of the object intended. But lest you should labour under any confusion on this subject let me extract for you the history of settlements.

" The first attempt at a settlement appears to be the creation of an estate in fee simple conditional. This had two effects, that of suspending the absolute power of alienation, till the birth of issue, and that of preserving the inheritance in a particular line of succession, so as to make it devolve through a particular line of heirs, in exclusion of others. Bracton mentions, lib. 18, that, by this mode of limitation, the estate might be settled by a person, on his eldest son and the heirs of his body, and if he had no heirs, or having heirs, if they afterwards failed, then to his second son and the heirs of his body, with like limitations to his other sons successively and their respective issue; and in default of all these, to the party himself and his heirs. This appears the most extended and complicated plan of settlement, which could be effected through the medium of this mode of limitation.

" Then came the statute De donis conditionalibus, that statute took away the power of alienation of the tenants in fee simple conditional, and thereby preserved the fee to the issue, and the reversion to the donor. This naturally gave rise to the complex modification of property, to which the reversion of an estate, out of which an estate tail is first carved, is now subject. By this mode of settlement land was at once completely taken out of commerce and involved in the intricate fetters of multiplied entails. This may be considered as the second *stage of settlements.*

" But entails were again subjected to the alienation of the tenant in tail by the introduction of common recoveries, about the reign of Edw. IV. and the introduction of fines by the statute of 4 Hen. 7. To prevent this, in some measure, women seised of estates tail of the gift of their husbands, were prohibited by the 11 Hen. 7, c. 20, from alienating these estates. To bring their estates within the protection of this statute, it became usual to limit the husband's estates, to the husband and wife, and the heirs of the body of the wife by the husband. The consequence of this was, that the estate was secured to the parents during their lives, and was secured to the issue against the act of either parent. Nothing short of the concurrent act of both parents could deprive the issue of the estate. A more rational system of settlement (particularly after the statute of the 32 Hen. 8, c. 27, had enabled tenants in tail to lease) could not perhaps be devised. The estate might be limited to the male or the female line, at the pleasure of the parties. It was protected against the caprice or extravagance of one of the parties, so long as the other refused to co-operate in unfettering the entail, while there was a provision for unforeseen events, by

their co-operation during their joint lives; and, during the life of the surviving parent, the same effects might be produced by the co-operation of that parent and the issue, and after the decease of both parents the estate was restored to the issue, with a complete power of alienating it. It may be a question whether, even now, this mode of settlement be not the most proper for all those cases, where, by reason of the smallness of the property, or any other circumstance, the intricate system of settlement, now in use, is not proper. This may be described as *the third stage of settlements.*

" A *fourth* was effected by limiting life estates to the parents, with remainders to their unborn children by purchase. This was introduced, soon after it was discovered how completely estates tail of every description were subject to the alienation of the tenant in tail by fine or recovery. But it did not soon become general. It was obvious, that, in every case, where the parent was himself the immediate reversioner, and in every case, where the parent not being the immediate reversioner, could procure the concurrence of the immediate reversioner, the unborn children were at the mercy of the parent. This gave rise to the introduction of trustees for preserving contingent remainders. This limitation is supposed to have been first discovered and introduced into practice by Sir Orlando Bridgman, during the time of the usurpation. Whatever doubts may formerly have been entertained on this head, it is now settled beyond the reach of controversy, that, under a limitation of this description, the trustees take a vested estate of freehold. The interposition of this estate prevents the tenant for life from surrendering to him in the reversion, and if he aliens his estate by any of those modes of conveyance, which would otherwise destroy the contingent remainders, and by a necessary consequence, be a forfeiture of the estate, it authorizes the trustees to enter for the forfeiture. This, to use one of the explanatory expressions inserted in these limitations, 'prevents the contingent remainders from being defeated or destroyed.' Such are the circumstances which appear to have given rise to this most frequent and important limitation, and the effects it produced; and thus it stands with respect to the alienation of the tenant for life without the concurrence or co-operation of the trustees. With respect to those cases, where the trustees cooperate in the alienation, it is obvious the estate of these trustees is that which we have before mentioned, of a person seised of a life estate in trust for another; and conformably to what we have before observed upon the alienation of a person so seised, his fine, feoffment, or common recovery acquires him an estate

by disseisin, and vests the estate so acquired by him in the purchaser. Here then the privity of estate fails: but courts of equity again interfere. This alienation of the trustees is evidently a breach of their trust. If, therefore, the conveyance be without consideration, and without express notice, the court implies notice. If it be with notice, then, whether with or without consideration, the courts make the purchaser hold the lands upon the trusts to which they were subject in the hands of the trustees. But if the conveyance is for a valuable consideration, and without notice, then the courts punish the breach of trust, by decreeing them to purchase lands of equal value to those, of which, by their breach of trust, they have deprived the parties, and to settle them to the uses and upon the trusts of the lands conveyed.

"The *fifth and ultimate* stage of settlements appears to have been effected, by the introduction of powers under the Statute of Uses. By these, as complete a dominion over the property which is the subject of the settlement is given, to the party and his trustees, as if it were not the subject of settlement; at the same time that the property or its value is completely secured to the parties, to their issue, and to all other claimants. Considered in this point of view, the plan and effects of a marriage settlement, as such settlements are now usually framed in England, are very striking; and will bear a comparison with the marriage contracts of any other country. These, generally speaking, either fetter the property so much as to take it entirely out of commerce, as is done by the *tailzies of Scotland with irritant and resolutive clauses*, or, like their settlements of what is called, *simple destination*, leave it so much under the control and direction of the parents, as to give little security for its safe transmission to the issue." (Mr. Butler's note, v. 290 b. Co. Litt.)

From this review we perceive that entails are at the foundation of settlements; that they and the Statute of Uses form two integral portions of one magnificent system: and that one of these cannot be substituted for the other without an overthrow of that system. We have too in the foregoing sketch a vivid picture of that gradual progress towards perfection, so characteristic of legal institutions when allowed to mature under the fostering care of the custodians and practitioners of the law. Nor can we help asking ourselves whether if entails were abolished the ingenuity of the profession would not very soon elude the effect of the change by the drafting of newly-devised instruments which would as effectually restrict alienation. You remember, sir, how fruitless all those attempts to confine the

jurisdiction of the respective courts of common law proved: how personal actions in general were brought within the cognizance of the King's Bench by the fiction of a trespass and of a trespass with the ac etiam clause or of the defendant being in custody of an officer of the court—as suits between subjects were brought within the cognizance of the Exchequer by the fiction that the plaintiff was a debtor to the Crown and by the defendant's wrong he was less able to pay as expressed in the quominus clause. And again with what subtle skill the ecclesiastical lawyers had successively devised common recoveries, feoffments to uses, and long terms of years, to evade the Statutes of Mortmain, the pertinacious enforcement of which by parliament would no doubt have been baulked by some new juridical stratagem, had not the churchmen gradually declined in legal acumen and the temper of the courts been so decidedly hostile to the absorption of land by religious houses. Then in more modern times see how the Statute of Frauds has been broken in upon in the case of equitable mortgages by the doctrine that the agreement does not remain in fieri but is executed. Thus is professional sagacity ever a match for the retrogressive or prohibitory measures of the legislature, when the wishes of a client, not conflicting with the sound interests of the state, call forth the display of talent and draw upon the stored-up lore of a lifetime. In vain then would you seek to destroy the law of entail. The desires of owners and the resources of counsel will assuredly nullify all your legislation; and the only result would be some temporary confusion and probably more cumbrous and complicated conveyances.

There is but one other topic in your letter I have not touched upon, viz. the unfounded tirade into which you have launched against the abstruseness and technicality of the law of entail. Had we not already exchanged some unreserved correspondence I should set down so thoughtless an assertion to a lapsus calami. But now from the insight I have gained into your character I should not wonder if you were really in earnest. If so, my dear Doe, by all means post back the effusions of a diseased though eminently prolific brain to

Your amused friend,

John Doe, Esq. RICHARD ROE.

WHITEACRE,
Manor of Dale.

My dear Roe,

Let me congratulate you on the keenness of your ethnological perception. You have actually found out that I possess a character resembling that of most persons enjoying the blessing of mental sanity. Let a discovery so prodigious and a stretch of genius so boundless be handed down "unto the last syllable of recorded time."

I have not yet so lost my senses as to be cajoled by jargon, however familiar; nor charmed by casuistry, however ingenious. And, when I enter my protest against the barbarous dialect and the insidious snares of the technicality and endless windings of the law, I am but the mouthpiece of all whose natural instincts for truth and straightforwardness have not been dulled or altogether crushed out by the long apprenticeship deemed necessary to turn out adepts in the art of making the worse cause seem the better. Would you have a true description of the manner in which justice is administered principally through the assistance of a hoodwinking phraseology? listen to a great master of satire's account:—"There was a society of men among us, bred up from their youth in the art of proving, by words multiplied for the purpose, that white is black, and black is white, according as they are paid. To this society all the rest of the people are slaves. For example, if my neighbour has a mind to my cow, he has a lawyer to prove that he ought to have my cow from me. I must then hire another to defend my right, it being against all rules of law that any man should be allowed to speak for himself. Now, in this case, I, who am the right owner, lie under two great disadvantages; first, my lawyer, being practised almost from his cradle in defending falsehood, is quite out of his element when he would be an advocate for justice, which is an unnatural office he always attempts with great awkwardness, if not with ill-will. The second disadvantage is, that my lawyer must proceed with great caution, or else he will be reprimanded by the judges and abhorred by his brethren, as one that would lessen the practice of the law. And therefore I have but two methods to preserve my cow. The first is, to gain over my adversary's lawyer with a double fee, who will then betray his client, by insinuating that he has justice on his side. The second way is, for my lawyer to make my cause appear as unjust as he can, by allowing the cow to belong to my adversary: and this, if it be skilfully done, will certainly

bespeak the favour of the bench. Now, your honour is to know, that these judges are persons appointed to decide all controversies of property, as well as for the trial of criminals, and picked out from the most dexterous lawyers, who are grown old or lazy; and having been biassed all their lives against truth and equity, lie under such a fatal necessity of favouring fraud, perjury and oppression, that I have known some of them refuse a large bribe from the side where justice lay, rather than injure the faculty, by doing anything unbecoming their nature or office.

"It is a maxim amongst these lawyers, that whatever has been done before may legally be done again; and therefore they take special care to record all the decisions formerly made against common justice and the general reason of mankind. These, under the name of precedents, they produce as authorities to justify the most iniquitous opinions; and the judges never fail of directing accordingly.

"In pleading, they studiously avoid entering into the merits of the cause, but are loud, violent, and tedious in dwelling upon all circumstances which are not to the purpose. For instance, in the case already mentioned, they never desire to know what claim or title my adversary has to my cow; but whether the said cow was red or black; her horns long or short; whether the field I graze her in be round or square; whether she was milked at home or abroad; what diseases she is subject to, and the like; after which they consult precedents, adjourn the cause from time to time, and in ten, twenty, or thirty years come to an issue.

"It is likewise to be observed, that this society has a peculiar cant and jargon of their own, that no other mortal can understand, and wherein all their laws are written, which they take special care to multiply; whereby they have wholly confounded the very essence of truth and falsehood, of right and wrong, so that it will take thirty years to decide whether the field left me by my ancestors for six generations, belongs to me, or to a stranger three hundred miles off.

"In the trial of persons accused for crimes against the state, the method is much more short and commendable: the judge first sends to sound the disposition of those in power, after which he can easily hang or save a criminal, strictly preserving all due forms of law." (Swift's Voyage to the Houyhnhnms, ch. v.)

How comes it the administration of justice is turned to such mockery? I reply, because of the unintelligible and repulsive phraseology, and the needless intricacy, of the law. That there

should be technical terms at all is bad enough: that those terms should be in a foreign language is still worse: but that they should be in a variety of tongues is past all endurance. Can it be believed that the estates and rights of Englishmen are bandied to and fro by means of words Anglo-Saxon, old and modern English, old and modern French, Greek, and Latin, classical and doggrel? No wonder with such a formidable barricade the law is inaccessible to laymen, and well may its professors batten and fatten on the splendid monopoly they have so strategically entrenched. Such is the utter defiance their security begets, that it seems almost a presumption for people not of their order to attempt to construe for themselves those laws, which they are bound to know at their peril; for, the moment a man gets into a scrape through ignorance of the law, the courts take very good care to din into his ears with befitting pomp and solemnity the unwelcome adage—Ignorantia juris quod unusquisque scire tenetur neminem excusat. And, if he would know why ignorance of law is not as excusable as ignorance of fact, he will perhaps be referred to Blackstone, who will assure him "a mistake in point of law, which every person of discretion, not only *may*, but is bound and presumed to know is in (criminal cases) no sort of defence,"—"a pretiosa ratio," as Mr. Austin observes, "flavoured with a spice of that circular argumentation wherein he delights"—an argument too that, we might remark in the words of the same writer, the great commentator "borrows with much complacency, gratefully enhancing its original absurdity by adding nonsense of his own."

To what a pitch of idiotic affectation have our legal instructors gone when they are unable to call a house a house or water water! Are not the unsophisticated rightly shocked when they find the so-styled learned gentlemen incompetent to name a dwelling-place without designating it a messuage or to speak of a lake or pond except as so much land covered with water? Ordinary persons when they would inform you a woman is single or wedded tell you so in a plain manner by saying she is unmarried or married; but such homely speech would never do for the dignity of wig and gown—oh, dear no! and with the appellations feme sole and feme covert the requisite air of erudition is put on. It is somewhat hard those who are in the enjoyment of or have a right to acquire personal property should not know how to express themselves correctly on the subject; still with their usual benevolence the lawyers have judiciously provided for that undesirable result, by making it juristic heresy to wander from the consecrated and unintelligible phrases—

choses in possession and choses in action. Do the terms "wrongful executor," "beneficiary," "for another's life," deserve to be tabbooed? Yet they are ostracised to make way for such grating gibberish as "executor de son tort," "cestui que trust," "pur auter vie!"

You are aware with what commendable solicitude the Court of Chancery in the case of charities and all the courts both of law and equity in the case of agreements, settlements and wills reform an instrument, the literal performance of which becomes impossible by matter of fact, as the failure of the charity, or by matter of law, as by violating the rule against perpetuities—so reform it, I say, that it may as nearly as possible carry out the intentions of the donor, grantor or testator. We might well offer up a libation for so gracious an interference, but our English Themis sends us no unmingled joy, for as if the permitted rectification were not already sufficiently difficult of itself, it must needs be couched in the obsolete terminolog "cy pres."

You might perhaps suppose I had now displayed the most revolting contents of the Pandora's box of evils our legal diction supplies—"Lay not that flattering unction to your soul." There are barbarisms more barbarous than any I have yet mentioned; but, not to weary you, let two examples teach the nature of all the black catalogue. You are sufficiently conversant with the relation of trustee and cestui que trust, and you know a similar relation subsisted before the 27 Hen. 8 between feoffee to uses and cestui que use. Just like the ancient feoffee to uses, the modern trustee is the legal owner of the estate and can make an indefeasible disposition thereof to a bonâ fide purchaser for valuable consideration without notice; but if there be fraud or no consideration or on the part of the purchaser no notice, then the latter is fixed by a court of equity as a trustee and is burdened with the execution of the original trust in all respects as his vendor would have been had there been no sale. So if the estate descends to the heir of the trustee, that heir will be bound by the trust as his ancestor was. Now the purchaser and heir are said to be the parties and privies of the trustee and to come to the estate through him. If however the trustee were ousted by a trespasser such trespasser would not be his party or privy and would formerly have held the land discharged of the trust as would also his heir on descent cast. So formerly also would the lord, who came in by escheat or the husband or wife of the trustee who became tenant by the curtesy or in dower—all these parties as well as a disseisor being said to come in by title paramount. Now how do you

suppose the distinction between obtaining through the feoffee to uses and by title paramount was expressed? By the glorious and bewildering brevity which declared, that those who acquired in the former mode were said to come *in* in the *per*, those who acquired in the latter, to come *in* in the *post!* Only think of the forty-shilling freeholder or the blockhead baron being enlightened by the pregnant significance of two Latin prepositions, which their innate profundity would probably turn to unmentionable interjections!

But for my second sample. You have often no doubt paused in admiration over that quaint old phrase—"time whereof memorie of man runneth not to the contrary." There is a sweet cadence about it which can never be forgotten. Will it be credited that this musical harmony has its dulcet melody generally marred by being allied with that most discordant bathos—"prescribing in a que estate." Better were it there should be no prescription for such things as lie not in grant and may pass without deed or writing than that a claimant should be so driven to murder the Queen's English or rather the Republic's French!

I find it no easy task to keep my promise of giving only two instances of that phraseology, which is the backbone of legal chicanery. What an acervus acervorum of hoodwinking terms—possessio fratris—nolle prosequi—interesse termini—voire dire—paraphernalia—hotchpot—laches—qui tams—latitats—demurrers—traverses—pleas puis darrein continuance—and the whole farrago of pleading. It is a serious enough crime to introduce and pass in this country the wretched money of foreign states, but how much more serious to clip and debase the current coin of the realm. As utterers of the incoherent language of foreigners our lawyers are under a grave charge; but as emasculating that of their fellow-citizens, they are infamous. And this is the head and front of their offending, that, when they do condescend to speak in common English, they twist and torture our words out of all rational meaning. What would you imagine they intended by "obligation," "month," "parol contract"—but stay, ab uno disce omnes. Get me the man who out of his own head can guess what they understand by the term "purchase"—get me one to solve that riddle and I shall rank him with Maskelyne and Dr. Lynn. Can there be a more outrageous perversion than to call the most gratuitous gift a purchase? and, on the other hand, to say that Fairfield, for the fee simple of which John Styles' father gave a mint of money, was not obtained through purchase by John Styles,

who happened to be the eldest son of his intestate parent deceased?

A praiseworthy zeal has carried me too far in this letter to allow of an exposure of the innumerable pitfalls dug on every side of the unwary suitor by the sedulous technicality of our legal tyrants. In one word, however, they have laid so many traps that no one can help being caught, who does not submit himself to their uncontrolled guidance.

Can such a desperate state of things be suffered to continue? Can you, Richard Roe, uphold the well-earned reputation of an honoured name without raising a hand against the Juggernaut, which tramples to death the virtue and honesty as well as the prosperity of a naturally-conscientious and truth-loving race? On, then! and let us hand in hand do battle against the knavish technicality, no less than against the beguiling slang, of the law, is the fervid exhortation of your much obliged servant,

Richard Roe, Esq. JOHN DOE.

BLACKACRE,
Manor of Sale.

My dear Doe,

I dare say you have read or heard of the opinion entertained by certain physicists that all matter is solid, liquid or æriform, according as the temperature to which it is submitted is made to fall, rise, or rise still higher. How fortunate could we delude ourselves with a similar hypothesis as regards the nature of mental products. But, alas! there is here no elasticity or compressibility, or, if any, none such as changes the character of the original phenomenon presented to our contemplation. Come, I shall be plain spoken: look ye, if an atmosphere of a million degrees below zero could be brought to freeze into a mass the gaseous explosion of rarefied trash contained in your last letter, there would not be a minimum visible of congealed reason as the result. If the most powerful Bramah press ever yet constructed, or that ever shall be constructed, were capable of being utilized in agglomerating that diffused inanity, there would not be squeezed together as much as a molecular atom of condensed argument or sound common sense!

I pass over the barefaced charge you made against the terms used to carve out an estate tail—a charge you have not dared to substantiate in the least particular. I am content to confine

myself to that rigmarole of execration you have showered down on that splendid creation of intellectual power—the phraseology of the law. Well, indeed, might I allow our juristic language to take care of itself, so overmastering has been the recoil of every reproach you have been hardy enough to hurl against it. For has not each stroke you aimed been sent back with twofold force by the wind-breaking periphrasis you have been compelled to adopt, whenever you sought to translate the brief but apt diction of the law. And then like all destroyers you have given us no specimens of the constructiveness which is to repair your work of demolition. Bear it in mind and lay it to heart, it is only out of friendship and by reason of the respect I entertain for John Doe that I deign to notice the frivolities he has thrust in such oppressive multitudes upon me; and that my subsequent observations are a generous explanation, not an enforced defence.

In undertaking the office of kindness thus proposed, I am burthening myself with a load of no inconsiderable weight; for, the truth is, your statements manifest so much confusion and, pardon me for adding, so much ignorance, that I fear I shall have to begin with those rudimentary facts of knowledge possessed by any average schoolboy. There is a strange haze dimming your mental vision, when you make the multitude of languages from which our terminology is drawn a subject of reproach. As well might you condemn the iron-clad that rides gaily at anchor, because her masts come from America, her engines from Birmingham, her bars and rivets from Sheffield, her sails from Leeds or Manchester, her signals from France or Germany. What matters it whence these various fittings are obtained, provided they best serve their purpose; and so why should we inquire in what tongue our jurists are pleased to speak, if only the words they employ are the most suitable to express their meaning.

It would seem, however, you lay an accusation against our jurisprudence for having technical terms of any kind. The fasciculus of absurdities bound up in this notion is so huge and at the same time so diversified, that I shudder at the herculean labour it would be to unravel even a small portion of the involved complexity. I shall not attempt to untie a Gordian knot so baffling, but, with the sharp sword of inductive illustration, I shall proceed with a few well-directed slashes to sunder to pieces the network of error.

Let me in starting demand as a postulate that law is or should be treated as a science. That granted (and who can refuse the concession?) it will follow that any universal method

or practice obtaining in all other sciences and obtaining necessarily from the very fact that they are sciences must also obtain in the science of jurisprudence. Now there is no science exclusive of jurisprudence which has not its peculiar and technical phrases; nor indeed could those branches of knowledge be designated scientific in the absence of such phrases. Therefore neither could law aspire to the rank of a science without a technical language. Next to prove my minor—(for the major premiss is self-evident)—let us review the sciences successively from complex to simple.

To avoid dangerous ground I shall not touch upon sociology, as you may dispute the existence or possibility of an aggregate social science, and I shall therefore begin with political economy. Well what are we met with on the very threshold of the subject? —the term money and its signification. On the threshold, I repeat, for is it not natural to ask in the first instance what is the origin of the inquiry about to be pursued? and the answer to that initiatory question informs us that it was to dispel the fatal illusion, which confounded money with wealth and thereby engendered and maintained the so-called mercantile theory, Adam Smith was induced to compose the "Wealth of Nations."

Open now the part that treats of production. "Land"—"labour" and "capital." "Productive and unproductive labour"—"fixed and circulating capital"—all so many technical terms needing definition and explanation. Proceed next to distribution—"rent"—"wages"—"profits"—"ground and agricultural rent"—"money and real wages"—"gross and net profits"—all again consecrated phrases. Then turn to exchange and you have "values," "prices," "instruments of credit," &c. —but it is needless to amplify examples of those abounding terms of art without which economical science would be an impossibility. Say not that this terminology being in our own tongue is more comprehensible and excusable. That it is in our own tongue is a matter of accident, because this particular science, at least in its infancy, was most cultivated in our own country. Yet are there many exotic phrases, as for instance, grande and petite culture—l'impôt progressif—métayers, &c.—and in the course of time there can hardly be a doubt that such importations will increase, inasmuch as, by the more general study of the subject, each respective nation will be able to furnish some peculiar idiom of its own, that will most exactly and best hit the idea intended to be conveyed. It is however no advantage to draw upon our common speech for technical language, since it is so difficult to separate the ordinary from the artificial signification —but of this more hereafter.

Descending to the next lower science we find in psychology the terms "subject"—"object"—"sensation"—"emotion"—"volition"—"thought"—"perception"—"consciousness." And if we go hence to metaphysics we have "phenomenon"—"noumenon"—"substance"—"attribute"—"cause"—but why proceed beyond the name of the subject itself? for hardly is there in the history of literature anything which shows to greater advantage how a useful techincal phrase may be coined out of mere accident than the word metaphysics, which arose from the fortuitous circumstance of Aristotle having treated of things in themselves next after his τὰ φυσίκα or natural philosophy. How futile it would be to deal with the matter of psychological or metaphysical science without technical language, let the dialogues of Plato and the common reproach that those pursuits are but a quarrel about words bear witness.

I may dismiss physiology in a line. The laws of life could not be discoursed upon without the use of the terms—"tissues"—"cells"—"corpuscles"—"functions"—or fixed phrases of equal scientific value.

Chemistry affords the most splendid instance of an elaborate and perfected nomenclature. Take the expression—tribasic phosphate of lime—which designates the mode of composition, wherein lime and phosphorus are found in the bones of man and other animals. With what compactness and precision this single name points out a salt, and the exact way in which by the union of acid and base its formation is accomplished! Take again the phrase—sesqui-oxide of iron; here too we have the exact proportion in which oxygen combines with iron to produce rust, told to us in a breath. Is not the chemist's admirably-chosen set of phrases something like the shelves of a well-arranged geologist's cabinet, where you have only to glance at the outside labels and straightway you have specimens of any particular period to hand? How this organized machinery of language has rendered feasible and then advanced the science of chemistry, it is unnecessary to dilate upon.

I pass next to physical optics and acoustics—the very first step in either of which is, to master the meaning of the word undulation, which expresses a different fact when applied to luminiferous ether, vibrating air, and disturbed water. Then what is understood by plane, circular, and elliptical polarization of light? an instance I cite to show how apparently misleading are the best technical terms; for would anyone suppose it was but the unseen inferred cause, not the palpable effect, which was the ground of these designations, which proceed upon the conclusion that one of the axes of vibrating

molecules vanishes—or is equal to the other—or varies between these extremes?

I need not dwell on those common phrases "reflection"—"refraction"—"focus"—"prism," &c. &c.—every student feels it would be vain to devote himself to an investigation concerning the nature of light or sound without such or similar assistance.

We need not delay over mechanics—"force"—"resultant"—"component"—"velocity"—"momentum"—"mass"—who does not remember the trouble of mastering these and a host of other terms—which once mastered so abridged future labour. Let us, however, dwell for a moment on the next successive science—mathematics—for, here, whether we deal with geometry or algebra or arithmetic, we are at every moment confronted with the most technical of language. The definitions of Euclid—the factors and functions that enter into a consideration of number—assail us at every step. Then is not the whole differential calculus an expansion of the single definition of a differential co-efficient? Nay, why is it there has been such a prodigious development of mathematical science in modern times? Because without dispute the abbreviated notation of logarithms, and the calculus, and the happy application by Descartes of algebra to geometry, have enabled us to deal by a new formalism with quantities and magnitudes heretofore utterly beyond the scope of language ordinary or technical. There are moreover several very remarkable peculiarities about the technical terms in mathematics. First, they appear arbitrary. Secondly, they are mostly of foreign derivation though now with English inflexion. Thirdly, they are not always used in the same sense—*e. g.* tangent is defined by Euclid: "A right line which meets a circle and being produced does not cut it." (Book iii. def. 2.) "Tangent is defined in conic sections; the secant to a curve in its limiting position, which is formed by taking two points on the curve and drawing a line through them and supposing one of the points fixed and the other to move up to it. I commend these peculiarities to your earnest attention, for they dispose of several objections you might be inclined to urge against our legal phraseology. And I commend them all the more since mathematics is the best type we have of science, and since the progress of all physical research tends to become mathematical, the transition being as it has been nicely stated "from qualitative to quantitative prevision." (Herbert Spencer.)

At length we arrive at the foot of the scientific pyramid. We have reached the scientia scientiarum—the ars artium—

logic, which, presupposed in every other branch of scientific knowledge, is, in its symbolism and technical devices, at least in the syllogistic or deductive portion, surpassed only by mathematics. Nor will you dispute the advantages that arise from the parallelogram of propositional opposition or from those artificial hexameters by which we so easily retain the several legitimate moods and figures.

What then is the fruit of this hurried survey of the field of science? That technical terms are found in every science: that their utility is obvious, their necessity inevitable. So much truth is there in the aphorism of Condillac, "La Science est une langue bien faite," and in the assertion that "many of the controversies which have had an important share in the formation of the existing body of science 'have assumed the form of a battle of definitions.'" (Mills, Logic, vol. ii., bk. iv., c. 4, quoting Whewell, Phil. Ind. Sc. ii. 177.)

Were I addressing myself to a less redoubtable antagonist I might lay down my pen with the demonstration now given of the universal prevalence of technical terms in the various sciences as an ample apology for their introduction into that of the law. But I feel I may cry out—

"Quo teneam vultus mutantem Protea nodo!"

and you will wriggle round with the hollow objection—Oh! I never denied that artificial language was right and necessary in science; nor do I deny that jurisprudence is or may be a science; only if it be it has no need of those terms, or at any rate the English law has no need or right to bamboozle us with an incomprehensible form of speech.

Well, my good sir, I am ready to meet you even here: and I shall show from the Roman jurisprudence, of which you are so much enamoured, that technical phrases are no reproach to our lawyers in particular, and I shall then prove the intrinsic, though universally-underrated, excellence of our own legal dialect.

You will have to own that the following are not classical words except when used in an actual or metaphorical legal sense: hercisco, sonticus, noxa, and that the word for cheating, "stellionatus," is in much the same predicament, whilst distrahere —to sell by retail, and insula—a detached house, rarely have these peculiar significations except amongst the jurisconsults. Of these various forms some are as old as the Roman law itself, being found in the Twelve Tables. Thus, Morbus *sonticus* . . . status dies cum hoste . . . quid horum fuit

unum, judici, arbitrove, reove, dies diffisus esto. Tab. II. 2. Si servus furtum faxit noxiamve nocuit. . . . Tab. XII. 2. And Gaius observes, Hæc actio (*familiæ herciscundæ*) proficiscitur a lege XII. Tabularum (Dig. x. 2), but the exact text has not been found or reconstructed.

Many more examples I might adduce of obsolete words, which, when no longer suitable for the common drudgery of speech, were like faithful old retainers eased of the vulgar toil and allowed to do honourable duty for the law; but for further information I refer you to the 50th Book of the Digest, tit. 16, De Significatione Verborum, and to the work of Festus. I cannot however in alluding to antiquated terms omit to transcribe the language used by the emptor familiæ when a will was executed per æs et libram:—

"Familiam pecuniamque tuam endo mandatela tutela custodelaque mea ex jure Quiritium aio, eaque quo tu jure testamentum facere possis secundum legem publicam hoc ære æneaque libra esto mihi empta." Here indeed is a fardeau de richesses; and though gradually supplanted by the prætorian form about the middle of the second or the beginning of the third century, the prætorian form being in its turn superseded in the first half of the fifth century by the Jus Tripertitum (Insts. ii. tit. x. 2, 3), under Valentinian III. in the East, and Theodosius II. in the West; yet have the labours of Savigny proved that the will per æs et libram was maintained in Europe even in the Middle Ages. So that the rugged style you so much deprecate in our law has warrant by the example of Roman jurisprudence, where it was consecrated in a formula which beheld the rise and fall of the Republic—the invasions of barbarians—the launch and wreck of empires!

I have already observed that your petition for the substitution of ordinary language in place of obsolete and foreign terms is an exhibition of the wildest folly. Indeed were I a special pleader I should hold you to your own admission by which you are estopped from disputing the misfortune that would attend the adoption of your proposal. For the ovation, on which you appear most to plume yourself in your last letter, is gained when you tap the reservoir of ridicule and bedrench the ill-fated term "purchase." Here is a word of common speech, and so inaptly does it serve the purposes of the law that you open the flood-gates and rain down a torrent of jeers enough to submerge St. Paul's.

Let me supply more matter for your merriment. Just consider the ambiguity which attaches to that phrase of

ordinary parlance—"property." Let an able anatomist of language dissect some of its principal meanings:—

"1. Taken with its strict sense, it denotes a right—indefinite in point of user—unrestricted in point of disposition—and unlimited in point of duration—over a determinate thing. In this sense, it does not include servitus, nor any right of limited duration. Sometimes it is taken in a loose and vulgar acceptation, to denote not the right of property or dominion, but the *subject* of such a right; as when a horse or piece of land is called my property.

"2. Sometimes it is applied to a right indefinite in point of user, but limited in duration: for instance, in common parlance, a life interest in an immoveable is a property.

"3. Sometimes the term 'right of property' or 'dominion' is opposed to a right of possession (which will be analyzed hereafter); that is, to a right over and in a determinate thing, which arises from the fact of an adverse possession. As opposed to this, the term 'right of property' almost comprises *servitus;* for it means, not a right distinguished by indefiniteness of user, but a right (either property or servitude) which is not a right of possession: a complete right as against the world as distinguished from a right against all the world *except* a determinate person or party who has properly the right in the subject; as when we say, that the right of possession ripens by prescription into dominium or property: and we say so even when the right acquired is a *servitus.*

"4. In the language of the classical Roman jurists, the term proprietas, or in re potestas or dominium, has two principal meanings. It is either a right indefinite in point of user, over a determinate thing: or, generally, jus in rem. In the first sense, it is opposed to servitus; and these form the two divisions of rights availing generally against the world. In the second or larger and vaguer sense, it includes all to which in the first sense it is opposed; all rights not coming within the description of *obligatio.*

"5. I think in English law, unless used vaguely and popularly, the term is not applied to rights in immoveables. We talk of property in a moveable thing. By absolute property in a moveable thing we mean what the Roman lawyers called dominium or proprietas, they having no distinction between real and personal property. But, in strict law language, the term is not applied to a right or interest in immoveables. An estate in fee simple, an estate in tail, an estate for life and so on, but never a property, speaking strictly. An estate in fee

simple corresponds as nearly as may be to absolute property in a personal chattel.

" 6. Another strange caprice of language is the following. The term property is applied to some rights in rem over or in persons but not to others. For example, the right of the master in the slave is called dominium in the Roman law and property in the English. The former word seems to have originally been applied exclusively to that right; to have been co-extensive with dominus, and to have extended only by analogy to things strictly so called. But in neither the Roman nor the English law is the analogous right of the father in his son included under the same name. So a man's right in his own person; it has been called a right of personal security, but never a property in his own person. This is analogous to the capricious application of the term thing. A slave in the Roman law was styled a thing, because he was the subject of a right residing in his master and availing against third parties, and was so far in a position analogous to that of a thing strictly so called. But the Roman lawyers did not call a son (though also in the power of his father and almost as completely subject to him as a slave) a thing: nor did they call the action by which the father might have recovered the son a vindication; which is the name peculiarly applicable to cases in which a right of property or dominium has been violated.

" 7. Another meaning of the word property is the aggregate of a man's faculties, rights, or means; called in the Roman law a man's patrimony: at least that name is given to such part of the aggregate, as descends to his general representatives on his decease, or is applicable to the discharge of his obligations if he be insolvent. It is tantamount to the term *estate and effects*, or perhaps to the term *assets*. In this sense it implies rights in personam, or obligations as well as rights of every other class. It is evident that a man's rights as against determinate persons are just as much applicable to the discharge of his debts, and devolve just as much to his general representatives, as his *jura in rem*.

" 8. A still more remarkable acceptation is the following. In the largest possible meaning, property means legal rights or faculties of any kind; as when we talk of the institution of property; or security to property as arising from such and such a form of government or the like. It is commonly said that government exists or should exist to institute and protect property. I have demonstrated in a note to my published Lectures, the absurdity of this doctrine. But the property here spoken

of must mean legal rights in the largest sense. It cannot be meant that government exists or ought to exist for the purpose of creating and protecting rights of dominion in the narrower sense, else it would be implied that it ought not to exist for the purpose of protecting rights arising from contracts and *quasi*-contracts.

" When we speak of a man of property, meaning a wealthy man, we seem chiefly to contemplate the value of his rights in external things, or of the debts due to him; the most conspicuous portion of his rights. Blackstone uses the term in that vague, vulgar, and unscientific sense, in the part of his work where he announces the arrangement of his second book. He there says that the law of things is conversant about rights of property or dominium, which he explains to mean the rights which a man may acquire in and to such external things as are connected with his person. He here manifestly means by property and dominium, not property and dominium in their strict, nor in any of their narrower senses, but in this large sense. For, lower down, he includes in the law of things, or the law of property or dominium, not only property in possession, absolute and qualified, or absolute and qualified property divested of possession by wrong, but also whole classes of rights arising directly from contracts or quasi-contracts, which are not rights over things at all, but rights to acts and forbearances to be done and observed by determinate persons. Thus if you contract to sell me a determinate quantity of corn, I have no property or dominion in the thing, but a right to force you to deliver corn according to the terms of the contract. If you have disposed of the subject of the right in the meanwhile to a third party, the property vests in the buyer, not in me.

" If the property vests in me before delivery, the transaction is not a contract, but compounded of a conveyance and a contract. Blackstone, therefore, must here use the word in a totally different sense from that in which he employs it afterwards. In fact, he here means by it a man's legal rights generally, or his faculties generally.

" The same may be said of what, under the head of the rights which he styles absolute rights, he terms the right of private property. What this might be, I could not for a long time make out: but, by comparing it with a corresponding passage in his third volume, it was cleared up. I could not persuade myself that it meant nothing. I now find that it does. It is merely a collective name for all those various rights which, either as property in the strict sense, or as rights derived from

contracts or quasi-contracts, are the subject of his whole Commentaries, and does not stand for a particular right at all.

"These are only some of the meanings of this most ambiguous word. It is most difficult to get on with it intelligibly and without endless circumlocution. For the present I mean by property or dominion, every right in and over a thing, which is indefinite in user, as distinguished from servitus. The various modes of dominion or property as thus understood, I shall show as I proceed." (Austin on Jurisprudence, Lect. xlvii. vol. ii. 3rd ed.)

I shall not insist further on the serious evils that would spring from attempting an abolition of technical language, but, before I conclude, I deem it a sacred duty to vindicate from four loathsome aspersions some of the most esteemed and trusty agents of legal expression. You shall not garble and misrepresent without retort. The oracle shall be invoked, and let his deliverances cover the scoffer with shame:—

"Item, si feoffement soit fait sur tiel condicion, que le feoffé donera la terre al feoffour, et a la feme del feoffour, a aver et tener a eux, et a les heires de lour deux corps engendres, et pur defaut de tiel issue, le remeyndre as droit heires le feoffour: en ceo cas si le baron devie vivaunt la feme devant ascun estate en le taille fait a eux, donques doit le feoffé per la ley faire estate a la feme, *cy pres* la condicion, et *cy pres* lentent de la condicion que il poet faire; scil. de lesser la terre al feme pur terme de vie sans empeschement de wast, le remeyndre apres son decesse, a les heires de les corps de son baron et luy engendres, et pur defaut de tiel issue, le remeyndre as droit heires le baron. Et la cause pur que la lees serra en ceo cas a la feme sole sans empeschement de wast, est, pur ceo que la condicion est, que lestate serroit fait a le baron et a sa feme en le taille: et si tiel estate ust este fait en le vie le baron, donques apres la mort le baron el ad ewe estate sole en le taille; quel estate est sauns empeschement de wast. Et issint il est reason, que *cy pres* que home poet faire estate a lentent de la condicion, &c., que il ferroit, &c., coment quel ne poet aver estate en taille sicome ele puissoit aver si le done en le taille ust este fait a son baron et luy en la vie son baron."

"Also, if a feoffment be made upon such condition, that the feoffee shall give the land to the feoffor, and to the wife of the feoffor, to have and to hold to them and to the heirs of their two bodyes engendered, and for default of such issue, the remainder to the right heirs of the feoffor. In this case if the husband dyeth, living the wife, before any estate in tail made unto them,

&c., then ought the feoffee by the law to make an estate to the wife as near the condition, and also as near to the extent of the condition as he may make it, that is to say, to let the land to the wife for term of life without impeachment of waste, the remainder after her decease to the heirs of the body of her husband on her begotten, and for default of such issue, the remainder to the right heirs of the husband. And the cause why the lease shall be in this case to the wife alone without impeachment of waste is, for that the condition is, that the estate shall be made to the husband and to his wife in tail. And if such estate had been made in the life of the husband, then after the death of the husband she should have had an estate in tail, which estate is without impeachment of waste. And so it is reason, that as near as a man can make the estate to the intent of the condition, &c., that it should be made, &c., albeit she cannot have estate in tail, as she might have had if the gift in tail had been made to her husband and to her in the life of her husband, &c." (Lib. iii. s. 352.)

So much for the antiquity and excellence of *cy pres*, and next for the term *hotchpot*:—

"En cel cas le baron et la feme naverount riens pur lour purpartie de le dit remenaunt, sinon quils voillent metter lour terres donez en frankmariage en *hochepot* ovesque le remenaunt de la terre ovesque sa soeur. Et si issint ils ne voillent faire, donques la puisne poet tener et occupier mesme le remenaunt et perner a luy les profites tantsolement. Et il semble que cest parole *hochepot* est en English a puddyng, qar en tiel puddyng nest commenement mys un chose tantsolement mes un chose ovesque autres choses: Et pur ceo il covient en tiel cas de mettre les terrez donez en frankmariage, ovesque les autres terres en *hochepot*, si le baron et sa feme voillent aver riens en les autres terres;

"Et cest terme *hochepot*, est forsque un terme similitudinarie, et est a tant adire, cestassavoir, de mettre les terres donez en frankmariage et les autres terres en fee-simple ensemble, et ceo est a tiel entent conustre le value de toutz les terres, scil. lez terrez donez en frankmariage, et de le remenaunt que ne furent dones, et donques particion serra fait en la fourme que ensuyt: Sicome mettomus que home seisi de xxx. acres de terre en fee-simple, chescun acre del value de xiid. per an, quel ad issue deux files, et lun est covert de baron, et le pere dona x. acres de les xxx. acres a le baron, ovesque sa file en frankmariage, et morust seisi de le remenaunt, donques lautre soer entrera en la remenaunt, scil. en les xx. acres, et ceo occupiera a son use demesne, sinon que le baron et sa feme voille metter les x. acres dones en frankmariage ovesque les xx. acres en *hochepot*, cestassavoir, ensemble; et donques quant le value de chescun acre est conus, scil. que

chescun acre vault per an et est assesse, ou entre eux agree, qu chescun acre vault per an xiid.; donques la particion serra fai en tiel fourme, scil. le baron et la feme averont oustre les x. acre donez a eux en frankmariage v. acres de severalte de les xx acres, et lautre soer avera le remenaunt, scil. xv. acres de les xx acres pur sa purpartie: issint que accomptant les x. acres que l baron et la feme ount per le done en frankmariage, et les autre v. acres de les xx. acres, le baron et la feme ount ataunt e annuel value, que lautre soer ad."

" In this case, neither the husband, nor wife, shall have any thing for their purpartie of the said remnant, unless they wil put their lands given in frankmarriage in hotchpot, with th remnant of the land with her sister. And if they will not d so, then the youngest may hold and occupie the same remnant and take the profits onely to herselfe. And it seemeth, tha this word (hotchpot) is in English a pudding; for in thi pudding is not commonly put one thing alone, but one thing with other things together. And therefore it behooveth in thi case to put the lands given in frankmarriage with the othe lands in hotchpot, if the husband and wife will have any par in the other lands.

" And this tearme (hotchpot) is but a tearme similitudinary, and is as much to say, as to put the lands in frankmarriage, and the other lands in fee simple together; and this is for thi intent, to know the value of all the lands, scil. of the land given in frankmarriage, and of the remnant which were no given, and then partition shall be made in form following. As put the case that a man be seised of thirty acres of land in fee simple, every acre of the value of twelve pence by the yeare, and that he hath issue two daughters, and the one is cover baron, and the father gives ten acres of the thirty acres to th husband with his daughter in frankmarriage, and dyeth seise of the remnant, then the other sister shall enter into th remnant, viz. into the twenty acres, and shall occupie them to her owne use, unlesse the husband and his wife wil put the ten acres given in frankmarriage with the twenty acres in *hotchpot*, that is to say, together; and then when the value of everie acre is known, to wit, what every acre valueth by the year, and it is assessed or agreed between them that every acre is worth by the yeare twelve pence, then th partition shall be made in this manner, viz. the husband an wife shall have besides the ten acres given to them in frank marriage five acres in severaltie of the twenty acres, and th other sister shall have the remnant, scil. fifteen acres of th twenty acres for her purpartie, so as accounting the ten acre

which the baron and feme have by the gift in frankmarriage, and the other five acres of the twenty acres, the husband and wife have as much in yearly value as the other sister." (Lib. iii. ss. 267, 268.)

Thus because those phrases have a well-ascertained and fixed connotation; because they are pre-eminently fitted by their brevity and singleness of meaning to become terms of art, because they are a history in themselves—like that other attacked expression "a plea puis darrein continuance," which indelibly records that all our pleading was originally oral—your taunts cannot be levelled with sufficient venom and malice.

You have indeed made a great mistake if you for one moment think brave old Norman French or forgotten English are hurtful to my ears, or to the ears of any one of good taste. I spurn the upstart politeness which spells "favour" "favor" or "honour" "honor." Nor are our resources of etymology so plentiful, that we can afford to dispense with those orthographic media through which we discern the peerage and passage of a word to English from Latin through French; and à fortiori I repudiate the endeavour to make our legal phraseology a bald and lifeless formula.

I have far exceeded the limits a correspondent may fairly claim; and I hesitate to affix the double stamp which plays the naughty tell-tale of the excess to which these sheets have run. Still you would prefer, would you not? the full and sincere outpouring of my thoughts which I take leave to back up with the following admirable observations:—

"And true it is, that our books of reports and statutes in ancient times were written in such French as in those times was commonly spoken and written by the French themselves. But this kind of French our author hath used is most commonly written and read, and very rarely spoken, and therefore cannot be either pure or well pronounced. Yet the change thereof (having been so long customed) should be without any profit, but not without great danger and difficulty; for so many ancient terms and words drawn from that legal French are grown to be *vocabula artis*, vocables of art, so apt and significant to express the true sense of the laws, and are so woven in the laws themselves, as it is in a manner impossible to change them, neither ought legal terms to be changed.

"In school divinity, and amongst the glossographers and interpreters of the civil and canon laws, in logick, and in other liberal sciences, you shall meet with a whole army of words, which cannot defend themselves in bello grammaticali, in the

grammatical war, and yet are more significant, compendious, and effectual to express the true sense of the matter, than if they were expressed in pure Latin." (Coke's Preface, Co. Litt.)

There—you must be now pretty well proved, I rather calculate, and in this desirable situation may you long live and learn, receiving the warm felicitations of

Yours ever,

John Doe, Esq. RICHARD ROE.

WHITEACRE,
Manor of Dale.

My dear Roe,

Double postage and twopence to pay! Would that it had been twenty times twopence, if at that small premium the lucubrations of your last could have been drawn to greater length! Only think of honest Dick Roe turning lecturer on science! Why, I suppose you will soon be quite a don amongst the savans—with a warehouse of rectorial chairs blocking your movements. You won't mind, will you? asking some of the medical guns if they have an antidote for spasmodic laughter; and please enclose prescription when next sending so powerful a dose of the ludicrous.

For fear I should spoil the fun, I shall not utter one syllable in answer to your discursive meanderings through technical language. But leaving to your meditation the Horatian advice —Ne sutor ultra crepidam—I proceed to examine some of that abstruseness and subtlety, which render our real property law (for, having borne the brunt of your wrath in going beyond entails, I may as well now make the most of my transgression), a parody on the common dictates of justice and integrity.

There are occasions when upright men wish they were scoundrels, that they might share in the booty so easily carried off by the unscrupulous rascal. Not unlike is the desire I now experience; for I feel incompetent to dive to the depths of our legal decoy ponds, unaccoutred with the obliquity and demoralization of a lawyer's mind. You must remember, therefore, I am but sounding with a fathoming line—not exploring—the bottomless regions of juristic chicanery.

Suppose now we have weighed anchor and are gaily on our voyage, if you scan the horizon you will observe at no great distance two frowning rocks, round whose jagged sides sweep

seething eddies and angry whirlpools. These are the famous Scylla and Charybdis of the law, through which it is impossible to steer, save at the risk or rather certainty of instant destruction, without the aid of an experienced pilot. You notice that one rock is sharp and pointed—that is the rock of technicality; and you perceive the number of unfortunates, who, impaled on those piercing projections, atone in anguish for their hardihood; whilst, to intensify their sufferings, they are compelled to witness the agile grace and comfortable bearing of the men with the tasselled heads and white cravats, who are here in their native element. The other is called the rock of simplicity; and, though crowded with all sorts of people, there is a strange and conspicuous absence of the persons with the queer hair and flat-faced neckties. This spot does not appear such a bad place, only there are no beaten tracks, and, if you want to go to any given position, you must make the shortest cut you can, expecting in consequence of the prevailing confusion to be knocked down several times on the way.

But your attention must have been already arrested by the forlorn condition of those unhappy beings, who in a moment of madness leaped with ropes attached to them from the rock of simplicity, and whilst still swimming towards the rock of technicality were seized by the sharks, and are now torn in two between them and the efforts of their friends to haul them back to shore. There is poor Tom Cheappenny, who, having several parcels of leasehold and freehold, drew his own settlement from a precedent he bought in Chancery Lane for five shillings. You see what he is enduring! Poor fool! he thought by a judicious distribution of the terms "seised" and "possessed" to make all square. But the matter was brought before the courts, and the judges declared they must give technical terms their due meaning; and, since he had not used the ordinary language of laymen, they could not give him a layman's privilege.

You have your gaze fixed on that pitiable band of beings chained together in a row at whom the monster of the deep makes those relentless bites. Alas! theirs is a sad story. They are the next of kin of the late William Knowall, who was seised in fee of the Marsh Gas Coal Mine—a highly valuable property though a most disagreeable place—and possessed of a magnificent mansion in the West End for a term of 999 years, and of chattels personal of considerable worth. This gentleman was not a jurist, but his erudition was of the most extensive character. His only relatives apparently were his nephews and nieces, the persons you see before you, who always

lived with him, and to whom he would invariably rejoin when pressed to make a will:—"Well, my dears, isn't it better I should leave matters to take their own course, since then you will come in for everything equally, except the old Coal Hole, and I have already disposed of that?" The truth was, his liabilities amounted to within a farthing of the total his personalty would fetch if realized as assets; but he had sought to render things agreeable to all parties by charging his debts on the mine and bequeathing his chattels in equal shares amongst his nearest of kin. The will was drawn in his own hand, and he used inwardly to chuckle over the thought of not having been in vain so frequently an executor.

"There," he would secretly exclaim, "let Bedford Row or Lincoln's Inn beat that if they can for neat and ship-shape work! I have not plodded, but I flatter myself I have not taken out probate a hundred times over without having learnt all that was to be learned."

But to be brief: What was the astoundment of the executors on the decease of Knowall to have, in response to their notice for all who had claims against the estate to come in and prove, a communication from the grandson of the testator's eldest brother, who had years before gone beyond the seas and never been heard of. The intimation was merely to the effect that as heir-at-law the writer was entitled to the freehold, which could not be touched until the leasehold and goods were exhausted in paying off the creditors. An administration suit of course followed, which was speedily brought to a termination by a decree declaring there was not a sufficiently-manifested intention to exonerate the personalty; and there you behold in those beggared relatives the fruits of—"Every man his own lawyer."

But you are peering towards the rock of technicality, and you evidently desire to ascertain something about its occupants. The object held fast by that pitch-fork projection has met with a deserved fate. Being a man full of conceit, he had the measureless audacity to ridicule the notion of the scintilla juris in the presence of a learned serjeant; and, so far did he carry his insolence, that he insisted an instrument should there and then be drawn up, by which all his property became instantly converted into inheritable freeholds and vested in trustees—the trust being in favour of the serjeant or himself according as the serjeant or he should succeed in convincing the court that the doctrine of scintilla juris was tenable or not. The trust deed was purposely worded ambiguously, so as to necessitate a reference to the judicial tribunal and to raise the disputed point and

call forth a pronounced opinion. On the day of hearing in strutted the supercilious and ill-starred layman, and, with a haughty air, began with a long string of consecrated terms. At length he commenced to talk of the seisin being in nubibus or in gremio legis, and was proceeding to argue from the absurdity of that idea to the point in question, when the chancellor, losing his grievously and long-tried patience, called him to order, and, putting the whole matter in a nutshell, asked him, had he a single authority for his wild assertions? Receiving no answer, he told the serjeant he would not call upon him, but ordered the trust to be executed in his favour.

Do you observe that quivering wretch, who is stuck so hopelessly on the needles, with which the rock of technicality is covered like a field of stubble? His case ought to be an awful example and warning. After a suit had been pending in chancery for forty years he at length fell out with his solicitor, Mr. Quicktitle, who thereupon returned all documents in his possession, having had his costs first duly taxed and paid. The papers were of enormous bulk, weighing several tons; and it took his client seven years' continuous reading to wade through their voluminous contents. When his mind had thus been thoroughly saturated with confusion, he bethought him it might not be a bad step to apply to the courts of common law and see what they could do for him. He accordingly instructed Messrs. Plausible to act as his attorneys, never mentioning the former litigation. The record, however, had hardly been made up, when an injunction issued out of chancery staying further proceedings. The attorneys now refused to continue the action, upon which their client fell out with them, as he had previously done with his former legal adviser. He then proceeded to sue in person, and would undoubtedly have been "run in" to Whitecross Street Prison for contempt, had not a respectable clerk of the Plausible firm given him a friendly caution of the tipstaff's dangerous proximity just at the right moment, by which he was fortunately enabled to elude capture.

His property, however, was sequestrated, and, though he afterwards purged his offence, he has found it ever since impossible either to have it back or to have his rights in general determined. That is the result of falling out with that most excellent body of men — the unjustly-abused attorneys and solicitors.

No wonder you so anxiously scrutinize that acrobatic-looking object—the man who lies horizontally poised in mid-air on top of the carriage-pole of flint, which rises like an obelisk towards

the heavens. That was once, perhaps, the greatest civilian the world ever saw. Imagine a musical-box capable of playing an indefinite number of airs with entrancing richness and variation —never requiring to be wound up, unable to be stopped, unless by its own spontaneousness, and liable to be set going by almost any conceivable circumstance—and you will have an idea of the acrobat so unpleasantly supported. Be the subject what it might, you had only to speak in his presence, and you would unconsciously touch an electric bell, that would straightway set him ringing the changes for hours together on what Papinian decreed—how Paul resolved—and why Ulpian differed. Then he would go to the Glossators, and for a time pretend Irnerius was the greatest of commentators; from him he would deftly pass to Accursius, Bartolus, and Alciatus, and praise them still higher—but all that was a mere foil to bring out the transcendant merits of Cujas—just as those comparisons and a running fire from the Italian, French, and German schools,— with his favourite dodge of starting some impossible point, that had never occurred to the Roman jurists, and throwing himself into their various characters to fight with himself over it, as if the balancing of the spheres depended upon the result—was but a foil to extol his own absolute supremacy—

"Quantum lenta solent inter viburna cupressi."

This mighty genius, having for many years roamed through the earth seeking in vain for some abstruseness he could not solve and wearying himself out in lamentation, like a second Alexander, that he had no more new worlds to conquer, at length perceived the compass needle of his destinies pointing towards Albion's shores. Hither then he came and very soon heard of the famous pedant, who had challenged the whole human species to propound a question he could not answer and who was bowled out by the law student, who requested a reply to the query—"Whether goods taken in withernam are irrepleviable?" Thereupon his soul kindled with a noble ambition to brave a similar test; and, taking a small farm, he prepared to demonstrate how preposterously simple the law of distress really is. His first care was—not to pay his rent: his next—to fetch the money due and spread it as gravel over the soil, in order both to show his own information and to irritate the landlord, who knew full well he dare not touch a farthing: his third care was—to pay no poor-rate, and, just as he had the plough in hand when the landlord called, so he would have the beasts unyoked and grazing when the collector appeared. This went on for some time, until at length a new collector was appointed

in the person of a quondam lord chancellor's coachman. On his first visit the new official said nothing more than that he must have the amount on the next occasion he presented himself. At this the civilian took an immoderate fit of laughing; and, arming himself with an umbrella, marched before the collector proclaiming himself his mace-bearer. The second visit was not long deferred; and, the rate not yet being forthcoming, the honest coachman coolly went up to the first of the loose beasts of draught, and seizing it by the forelock led it away. Here was the long-coveted opportunity; now would the learning of the intellectual giant be distilled as the honey of Hybla! In due time an action was brought for wrongful distress, to which the defendant put in a simple demurrer. When the case came on the court was so crowded that many of the reporters had to sit on the table—the witness and jury boxes—not to speak of the ordinary forms—being taken possession of as coigns of vantage by a clique of provident individuals, who had been concealed within the four walls since the preceding night—whilst the judges themselves were wedged in, like a closely-guarded body of malefactors, by the numbers of foreign ambassadors and other illustrious personages who were accommodated with seats on the bench. It is needless to record the utter discomfiture of our unfortunate acrobat, who with all his responsa, distinguos, pounds overt, and pounds covert, could never get over the single contention of the coachman that "distress" under 43 Eliz. and other such statutes is in effect "execution," and that therefore the seizure was perfectly valid. . . . That's what is called driving a coach and four through an act of parliament.

You are straining your eyes at the thing distended on what one might take for a monster forceps. The story of this hero is remarkable. Few surgeons ever enjoyed larger practice; and, though in his time railways were only recently introduced, it is no exaggeration to say they with his other business supplied quite as many subjects for amputation as any one man could well get through. At length an appalling collision brought him, amongst the injured, one poor being, whose life he prolonged for three weeks, by taking off both legs and arms. The helpless cripple was not without gratitude; and, as a slight mark of his esteem, devised his estate of Koptoskelea to his benefactor for life, remainder to his wife for life and the heirs of her body by her present husband begotten, successively in tail male. Then followed the usual limitations of a strict settlement, which in this case, however, were more than ordinarily complicated by the immense number of shifting clauses, which made the

devolution of the estate conditional on the devisee being or immediately becoming a surgeon; and in default of all the male dispositees adopting that profession, then the estate was to go to the male beneficiary who took to anatomy, physiology, or medicine; and lastly, in default of any and every such person doing so, the preference was to be given in order to the female heirs who became practising physicians. There was also a direction, that at no future time should a recovery be suffered or fine levied; and to Neuter, who had no interest of any kind in the lands, was given a power of selling to that one of the surgeon's sons who should perform most operations in one year from his father's death.

When they returned from the funeral and the poor cripple's will was read out, the surgeon could hardly keep his countenance —"just as if"—he cried—"I who have cut off a thousand limbs don't know how to cut off an entail. The knife will make short work of this! And then the absurd restriction on barring the issue, which every one knows to be as impossible as the maintenance of life on carbonic acid!"

With what unerring skill the first incision was made may be gathered from the amputator himself levying a fine and getting his wife to suffer a common recovery. Fortunately his page, whose last situation was errand-boy at a conveyancer's, overheard the braggart-talk of his master at dinner; and, when the guests were gone, in the most polite manner possible, pointed out the absurd mistake, which the master rectified by suffering a recovery himself and getting his wife to levy a fine. The page had modestly asked to see the will, thinking there might still be something in the background, which would render all this expense of no avail, but this was too much of a humiliation, and Chirurgus without further consultation obtained a release from Neuter, who let the fool go on in his folly, and who now holds over the surgeon the threat of exercising his power of sale with as much cause for alarm as the sword was held over the head of Damocles.

There's the tragedy—as you object to the comedy—of Fines and Recoveries!

Do you observe the creature with the check tweed—the squares of which are alternately impressed "sold note"—"bought note?" He is reclining on what seems to be a bed of coal, though from his fixed look of panic you might think it was a layer of volcanic lava. Not long since this expert financier happened to meet, in one of his job-stocking transactions, with a surveyor who gave him to understand there was a valuable seam of Silkstone in a retired part of the country,

and that any one might make his fortune by purchasing a piece of ground before the secret got wind. The Cornhill bird had only to assure himself there was no "salting," and his resolution was forthwith taken. It was impossible, however, to obtain even the smallest parcel of land for love or money, so well contented were all the proprietors with their little farms and rural happiness. Necessity is the mother of invention. The stockbroker hit on the bold expedient of building a tempting "public" not far outside the enchanted ring—the only spot he was able to obtain. This is duly furnished with the various poisons of Mark Lane; and now the satanic plot is ripe for execution. It was no reproach to surrender to so dreadful an assault at discretion, and Bibosus delivered up the land—bought seven years ago from his wages savings, hoarded up during a long and faithful service with the Master of the Rolls. "Exchange is no robbery," said the man of the city, as the retired butler put him into possession of his two acres fee simple and received the leasehold in return.

In a few months shafts were sunk—gear in order—and tons of coal hourly thrown up from the newly-discovered mine. Meantime the vintner had been several times heavily fined for selling adulterated liquors, his only excuse on each charge being that he was "improving the coalheaver out of his estate" —an answer and analogy which, as the magistrates did not know much about equity, justified them in directing the parish doctor to inquire into the prisoner's state of mind. At length the supposed lunatic gave an unmistakeable indication of his insanity by proving that it was only when his former acres were being disembowelled, he found out that the "public" was not the largest of freeholds, and that he had cheerfully submitted to the fines in order to give the shop a good name, so that, on the re-transfer which must then take place, the broker might rejoice as much in the wines as he hoped to do in the coals.

That's what may be named "going on legal 'Change."

You cannot but be struck by that pallid and stiffened form for all the world like the corpse of a person recently drowned. Those are the remains of Captator juvenum, who used to oblige young men and expectant heirs on their simple note of hand, bond or post-obit. Cursorius, who had been much addicted to horse-racing, had recourse in his early days to the generosity of this gentleman, who as time went on was wont to force the pleasure of his company on his friends with an importunity as unseasonable and undesirable as that of the character in Horace, cutting off, however, at the same time by a rampart of

terror all retreat to so welcome an asylum as that described by the poet in—"licet te antestari." Longævus would persist in living on; and so atl ength his unhappy nephew Cursorius, all of whose engagements were to have been discharged out of what it was hoped the old boy would cut up for, was at length driven by the pressing attentions of Captator juvenum to part with the paternal estate that had descended to him and his fathers' fathers time out of mind.

Captator amongst his other accomplishments had, as he himself expressed it, "a marvellous aptitude for 'fishing;'" and, during a momentary absence of its owner, he cast his line into the private desk of Cursorius and tackled, amongst a heap of love letters, one in which Cursoria said papa would be quite satisfied if she were to have a freehold, and that as "her dearest" agreed to that "the happy event" might come off immediately. On his return Cursorius could not for the life of him make out why Captator had so suddenly veered round from his original demand for a conveyance to himself of the fee out and out. "You see I don't want to be hard on you," said Captator, who only insisted on a term to himself not of 99 or 999 but 99,999 years, remainder to trustees during the life of Cursorius to preserve contingent remainders, remainder to Cursoria during her widowhood, remainder in fee to his own right heirs.

A few weeks after, Cursorius broke his neck at a steeplechase, surviving the accident but two minutes and a half, during which interval, however, he was able to scribble on the back of a correct card for the races—"I leave all I have or ever shall have to my darling wife Cursoria"—then followed a big blot, a bludgeon, and a riding whip—the rapid approach of death not allowing the testator, and their ignorance of the second of the "three R's" preventing his witnesses—a policeman and jockey—from otherwise subscribing.

The widow, who was left almost destitute (for her unfortunate husband, though on his decease he owed a shilling to no man, had been pretty well cleared out by Captator juvenum), was long inconsolable at her bereavement, until indeed her comely beauty and attractive manners won the inflammable heart of a young solicitor only just admitted. There was but one obstacle to the union—the want of that plebeian convenience termed "tin" in ordinary slang. Whilst they were one day exchanging professions of eternal devotion with more than usual ardour, and regretting that the patrician qualities of uncalculating magnanimity and benevolence were not the circulating media of wealth, Cursoria pulled out the correct card hitherto worn next her bosom and was on the point of tearing it up, when

there fell from her pocket one of the many whining epistles of Captator juvenum, who, possessed with a phrensy for being able to call himself a freeholder, besieged the starving relict with the mean offers of a shilling, then half-a-crown, and so on to a sovereign, and eventually a five-pound note, for the assignment of her estate. Cursoria, as she had been spited, had hitherto spited the spiter by refusing to gratify his vanity, and now she was to have the triumph of honourable pride. Her true-love solicitor, whose quick eye ran through both documents with eagle glance, took in the situation as the great Napoleon would have hastily taken in a field of battle. "Forward! March!" roared he, with Bonapartist determination; "lose not a moment: go straight to Captator juvenum and tell him 50*l.* and the assignment, or an emigrant's free passage, will, in twenty-four hours—during your life at least—blast all his fond expectations!"

The only delay was to pass through the enormous number of bankruptcy officials and huge piles of cheques—all marked "no account"—which blocked the doors and approaches of Captator's residence; for Cursoria flew on the wings of love, and Captator seeing her decision instantly gave her the ten fivers required. This sum barely defrayed the telegrams to the invited friends, the expenses of the wedding breakfast and the fees of the clergyman who next morning performed the marriage ceremony.

It was certainly a curious honeymoon — stranger, perhaps, for the late Cursoria to be back once more in the old place than for the enraptured bridegroom, who might as well for several weeks have been at the office in Bedford Row, so much of his time was engrossed in raising money on the estate and in convincing the professional advisers (who, in truth, needed no conviction but had to submit to the headlong stubbornness and dictation of their client in fighting on) of Captator juvenum that the widow's mite had put an extinguisher on the remainder no less than on his 99,999 years.

You have heard of a—"baptism of fire"—now you can describe a—"baptism of law!"

One parting look at the three conspicuous figures in a group, like, from their symmetric arrangement and proportions, the balls over a pawnbroker's shop! The tattered ermine that flutters in the breeze and the vulture pecks on the two ill-fated Prometheus' by the men with the baggy heads and blanc-manger neckcloths disclose at once the names Reichel and Thirning, whose collar discovers the rank of chief justice; whilst hard by the other member of the trio, the quenching of whose thirst for accumulations is ever cruelly prevented by a pitiless act of par-

liament, is the wretched Tantalus Thellusson, whose similar propensities have located him with the lovers of perpetuities.

And now to a pleasanter task. Those flitting figures, that so marvellously tread unscathed the bristling spurs and keen-edged ridges of the rock of technicality have devoted their lives like rope-dancers to this one pursuit. Those balanced evolutions, those wing-footed strides, are engrained into their very nature by long practice and training. Here, a performer speeds lightning-like over the dangerous ground of lineal and collateral warranties; there, he scuds along the thorny paths of remitter and conditions. Now, a mighty plunge into the dark abysses of abatements and intrusions; now, a dread header over the yawning precipices of disseisins and discontinuances; anon, a Hengler-like somersault across the duplicated rows of possibilities and expectancies.

But enough! we have had a glimpse of Scylla and Charybdis, and I shall now tell you how they came to exist. Originally the ocean of human intercourse was a smooth expanse — unchequered with a single sandbank or cliff to break its flow or disturb its peaceful course. In an evil hour a portion of its waters were, by wrangling contention, separated from the rest into a wheel-like mass of rapidly-rotating froth. At certain intervals, the concentric rings, which all moved in different directions, would break from their orbits and a stupendous cataclysm ensue—and then a new set of motions be gradually restored. The last of these cataclysms, being of such magnitude as to determine for ever the directions in which the froth should revolve, was the nidus of the rock of technicality, which by successive deposits at length assumed its present enormous dimensions. Concurrently with it and as its consequence arose the rock of simplicity, which is a crystallized compound of the previously-diffused free and open dealings of men, which were welded together into one fabric by the disturbing influence of the first formation. Thus from its fell bosom did the legal Scylla draw the legal Charybdis, that both might for ever beset with menacing aspect life's unwary traveller.

It is next incumbent to point out the character and constitution of the rock of technicality. In pursuit of this object time and space require that I should cut short the geologic record and, skipping the primary and secondary, limit myself to the tertiary period.

Perhaps the most prominent element in this stage is that interlaced seam, which grows more and more complicated as you descend, but on the surface juts out into a number of terrible spikes, known as the "Range of the Rule in Shelley's Case."

When I have stated something of its nature, you will cease to wonder at the myriads who have been dashed to pieces in the foolhardy attempt to scale its perilous peaks.

John Goodright, being a large owner in fee simple, gives an estate in Whitefield for life to James Wellvesting, remainder for life to Jacob Hopeful, remainder in fee to the heirs of Wellvesting. This is the smoothest point. The heirs take nothing; and Wellvesting has a vested estate for life in possession with a vested remainder in fee expectant on Hopeful's vested remainder for life.

Goodright gives Blackfield to Wellvesting for ninety-nine years, remainder for life to Hopeful, remainder in fee to the heirs of Wellvesting. This point is also very smooth. Wellvesting has the chattel term in possession; Hopeful the immediate freehold to come into possession on the expiration of the term; and the remainder in fee will go to the person who shall answer the description of Wellvesting's heir on the determination of Hopeful's estate, which is supposed to take effect in possession.

Goodright gives Redfield to Wellvesting for ninety-nine years, remainder to his heirs. This point is only smooth. Wellvesting takes the term; but neither he nor his heirs get anything more. And the heirs would be equally disappointed in the case of Blackfield if Hopeful were so disagreeable as to die during the ninety-nine years, Wellvesting still living; but, only let Wellvesting depart this life during that interval, or let Hopeful enter upon the hundredth year and before his demise let Wellvesting die, and then lo and behold you! the grant turns up a trump for the family of Wellvesting, which obtains the chattel term to begin with, and in the long run the freehold inheritance.

Goodright gives Greenfield to Wellvesting for life, and on a day following he gives the remainder to the heirs of Wellvesting and the heirs of those heirs—the gifts being by separate instruments. This point is a little sharp. Wellvesting has the freehold in possession for his life, and there is a remainder in fee in the person who shall answer the description of Wellvesting's heir on his death—but the heir of that heir takes nothing.

Goodright gives Bluefield to Wellvesting for life, remainder to his next heir and the heirs male of the body of such next heir. This point is decidedly sharp. Wellvesting has an estate for life; and there is a remainder in tail male in the person who shall answer the description of Wellvesting's heir on his death—the reversion over being in Goodright.

Goodright gives Purplefield to Wellvesting and the heirs of

the bodies of himself and his wife. This point is still sharper. Wellvesting has the immediate freehold for life, and there is a remainder in tail special to the issue of his present marriage—the reversion over remaining in Goodright.

Goodright gives Wellvesting Gavel Hill in Kent for life, remainder to his heirs in fee. He also gives him Gavel Valley in the same county for ninety-nine years, remainder to Hopeful for life, remainder in fee to Wellvesting's heirs. Wellvesting died a hundred years after intestate without meddling in any way with the disposition of the properties, leaving him surviving his two sons John and Thomas—his only descendants—and Hopeful. This point is unpleasantly sharp. John (the elder of the brothers) has a vested remainder in fee expectant on Hopeful's life estate in Gavel Valley; and he and Thomas have a moiety each in the fee in Gavel Hill.

Goodright did not forget the ladies; for he gave Wellvesting Brownfield and Greyfield during his life, remainder to the heirs female of his body. And he further gave to the said heirs female of Wellvesting's body Rosefield and Daisyfield in remainder expectant on a life estate in these same lands to Hopeful. Wellvesting we know died intestate, and, besides his sons, he left an only daughter to bemourn his loss. This point is piercingly sharp. Wellvesting takes an immediate estate in tail female in the first lot, which descends to his daughter—but neither she nor any of her family get a rood in the second lot. And so with this last "diversitie," let us take leave of the Shelley Range, and that in haste for fear of being ourselves transfixed—observing that its diversified structures may all eventually be resolved into the components, (1) a freehold in the ancestor, (2) a subsequent limitation in the same instrument to his heirs or the heirs of his body, which in combination always yield one or two estates vested in that ancestor.

Not far from this historic spot we notice two pronglike projections, having no connexion, but standing apart, conspicuous by their isolation. In final analysis they both prove to be of construction soil; and receive the common name Chartæ testamentaque, which denotes in one instance, that a limitation to a man and his heirs male gives him a fee simple in a deed but a fee tail in a will; and in the other instance, that a power of appointment raised by a conveyance to the uses of a last will speaks from the execution of the will, but, when raised by a conveyance to such uses as shall be appointed by a last will, speaks from the execution of the conveyance.

The next objects that meet the eye are those lines of dagger

stakes, which from their general regularity, one might take for the bayonets of a regiment of soldiers, though here and there are stragglers, which it is impossible to reduce to order. All this region is styled Deusibus ; and it is my intention to allude only to a few of the aberrant members of the various groups, as the composition of the ranks in line is sufficiently obvious. On the left there is a curious speck, which apparently sways to and fro at every brush of the men with the strange heads and starched chokers. Minute as it is there are several ingredients in its construction. First, is a conveyance by A. to B. and his heirs to the use of A. during life, remainder to B. and his heirs during the life of A., in trust to preserve contingent remainders, remainder to the first and other sons of A. successively in tail male, and in default of such issue to the right heirs of A. There is then a conveyance by A. and B., before any son of A. is born, for valuable consideration by bargain and sale enrolled to C. and his heirs, who has notice of the settlement. From the union of these factors statutory seisin is of course produced; but the odd thing is the ease with which the rapidly-moving figures incline that seisin now to A. and his sons—now to C. and his heirs.

There is a similar oscillation about the seisin conferred by a devise to A. and his heirs to the use of B. and his heirs, for, although the seisin is no doubt executed in B., those amusing figures seem to govern it by statute or intention quite at their pleasure. They are equally arbitrary as to where they locate the seisin, when a conveyance is made to A. and the heirs of his body to the use of B. and his heirs—whether to A. in tail or to B. in base fee.

On the right of the locality we are considering there are two small promontories, the bluntest perhaps over the whole rock of technicality; though, as you shall presently see, a fall upon one at least may entail some very black bruises. The mode in which they are built up is extremely simple. In the first we have a conveyance of 1,000 acres to A. and his heirs to such uses as B. or C. shall appoint amongst D.'s (a person then living) descendants; and also, another conveyance of 1,000 acres to A. and his heirs to such uses as B. or C. shall appoint; and in both instances in default of appointment to the use of the right heirs of D. For B. put fellow of the Royal Society—for C., barrister's clerk—and you will have the circumstances which occurred in actual life. The association may appear somewhat strange; and still stranger will it be thought a proposal should have come from the savant to toss up for the choice of exercising the authority, which they agreed should belong to

only one of them in each instance. But fact is often stranger than fiction. On hearing the proposal the barrister's clerk was thrown into a strange state of wonder and excitement; then suddenly the explanation of so apparently strange a piece of conduct flashed across his mind with striking vividness. He had frequently listened with rapt attention to the glowing panegyrics delivered with such power and fluency over our system of trial by jury. Indeed, one of the very things which had most contributed to impress him with a profound sense of the ability of his master was the admirable manner in which, no matter what had been said on the other side by way of praise or compliment concerning that institution and more particularly concerning those who actually on the occasion happened to be sitting in judgment, his master had always some greater praise and compliments in reserve to answer with. The clerk had also observed that if any commendation were left unspoken by counsel, and, in general, whether so or no, the judge made up the deficit or paid twice over with compound interest. Trial by jury and the summum bonum became under these circumstances convertible; and as the Royal Society was known to be A 1 in the established order of affairs, the deduction was natural that its whole office and functions must necessarily consist in the sitting of juries and development of the system to its highest perfection. With such a train of sequence it was easy to make allowance for habit, which we all know becomes a second nature; and the clerk, suffering the man of science to remain in his imaginary jury-box, immediately complied with his request; and spinning a halfpenny high in air won the toss. Thereupon the clerk selected the second of the foregoing powers, and appointed to the infant great-grandson of D. (born only half-an-hour previously) for life, remainder to trustees and their heirs during the life of such grandson for preserving contingent remainders, remainder to the sons of such grandson successively in tail male, remainder to his daughters and the heirs of their bodies as tenants in common, with cross remainders between them; and in default of such issue, remainder to the great-granddaughter of D. (twin-sister to the great-grandson) for life, remainder to trustees and their heirs during the life of such great-granddaughter for preserving contingent remainders —with remainders over to her issue similar in all respects to the remainders limited to the issue of her brother—remainder to F. and his heirs, provided F. or his heir, if F. were dead, should adopt the name and arms of D. within twenty-one years from the vesting in possession of his remainder; and, in default of F. or his heir doing so, or if F. should die within those twenty-one

years without having done so and without heirs, then remainder to the right heirs of D. The man of science exercised his power in the first estate by appointing to a grandson of D. (who was the child of a son of D.'s, born twenty years before, just after D. had executed the deed creating the powers) and his heirs; but, if such grandson should die within one year and one day from that time, then the estate was to shift and go over to the right heirs of D. who had died a few months previously.

The worst of this affair was that the F.R.S. was a very big man indeed in the scientific world and was recognized all over Europe for the reach and profundity of his extraordinary genius; but, being human, the combined efforts at the club of all the judges in the kingdom, English, Irish and Scotch—both legal and equitable—were utterly unavailing to convince him of the error of his ways; and so incensed was he at having the correctness of an inferior of the Temple compared with his blunder, that he could not endure the mere sight of a place so painfully associated, but used always, when coming from the academy to Ludgate Hill, to tell the driver to turn up at St. Mary's Church and go round by Holborn.

The second promontory above alluded to hardly claims attention. Here's its nature: the eldest son of a deceased widow conveys, of the lands he has inherited from his mother, the highlands unto and to the use of A. and his heirs—the lowlands to A. and his heirs to the use of himself (the eldest son) and his heirs. A. reconveys the highlands unto and to the use of his grantor (the eldest son) and his heirs. The son then dies intestate without issue, ancestors or relatives of any kind save his uncle on the father's side and his aunt on the mother's side. The highlands go to the uncle, the lowlands to the aunt.

It would be improper not to bestow a passing glance at that dwarfish hillock—conveyance to Jones and Robinson, habendum to the use of them and the heirs of their two bodies; for a flippant writer in one of the dailies wanted to make out the donees were not joint tenants for life with several inheritances in tail, but that the statute operated and consequently the gift would not extend beyond the life of the longest liver, in whom the whole became vested by survivorship!

There is just one more object we shall examine before quitting the territory Deusibus—limitation to A. and his heirs to such uses as B. shall appoint, and until and in default of appointment to the use of B. and his heirs—the grantor entering into covenants for title with B. You will perceive from the

following narrative how much truth is contained in the saying, "handsome is that handsome does;" and it is in consequence of its application to that doctrine, and as furnishing in this instance an exception to the general rule of hardship that is its usual concomitant, I notice the pillar of Subtlety, the outlines of which are above chalked out. Philofamilias, who was a widower with three grown-up daughters on his hands, purchased the following estates from Polyaulax-Vaintitle, Pleasanttitle and Agreeabletitle, which were severally limited to Outis and his heirs to such uses as Philofamilias should appoint, and until and in default of such appointment to the use of Philofamilias and his heirs. Negociations for the marriage of Superbia—the most unamiable of the children of Philofamilias—with Mr. Skinflint having been entered into, the intended husband, who was a great old screw, insisted upon having Vaintitle settled upon himself and the heirs of his body; then followed a long string of selfish provisions, by which not only the husband's relatives but even his bowing acquaintances were to take in default of his issue and in total exclusion of the wife and all her kindred, and, for a wind-up to the most exhaustive contingencies a miserly spirit could devise, there was a limitation to his own right heirs. Poor Philofamilias, to whom this alliance was neck or nothing, had no option, and accordingly appointed Vaintitle in the manner required. But what was the joy of everyone to find Skinflint hardly in, when he was hopelessly ousted from, the possession—his father-in-law being reduced to his last legs by the loss of three ships which had gone down in quick and almost clockwork succession—whilst Bigheart and Goodsoul, the husbands of Philofamilias' two other daughters, who had acted in the nuptial agreements in the most generous manner, being also ousted, had their remedies over against Polyaulax, who had covenanted for title with Philofamilias and his heirs in the case of Vaintitle and Pleasanttitle—but with Outis and his heirs in the case of Agreeabletitle, which latter as well as Vaintitle was appointed instead of being conveyed as Pleasanttitle by Philofamilias! When these results became known it was universally observed by the neighbours of Skinflint "Serve him right!"

As we sweep towards the last tract I propose to analyze on the rock of technicality, you can hardly help being struck with the mode in which the powdered denizens shake that fossil-like splinter—a devise that executors shall sell lands. For on the death of all the executors but one—the devise, if then unexecuted, is sometimes made to approach to a devise that lands shall be sold by executors, sometimes to a trust that the trustees may in their discretion sell.

Now at length we have reached that extensive area so rugged and impassable that not even the most veteran of the rock of technicality's inhabitants durst venture thither alone. Fortunately there is always a guide at hand, or else the most fearful catastrophes must constantly ensue or the ground become untraversable. This guide may fairly be ranked as a magician. In the shape of a goodly octavo he bears the magic wand; with this he but smites, and instantly the crags and clefts of contingent remainders, conditional limitations, and executory devises are levelled to one uniform surface. In this local genius you behold the wizard Fearne, some of whose feats we shall now witness. Limitation to A. for ninety-nine years, remainder in fee to A.'s eldest son if he should outlive A. We can do without the magician here, for we all know the son can take nothing. But what if the limitation be to A. for ninety-nine years if he should so long live, or to A. for twenty-one years if he should so long live, remainder in fee to A.'s eldest son if he should outlive A.? The wand is brandished, and in a moment the apparent chattel, in the first instance is resolved into a virtual life estate, but in the second instance retains its original character; and so the eldest son in the former case has a contingent remainder, because it is supposed his father will be good enough to die during the ninety-nine years; but in the latter case if the father could die five times over during the twenty-one years, and actually did do so, that multiple mortality would not cure the absence of a particular freehold, for the raising of which by implication there is in this instance no reasonable supposition that the father will die at all during the term.

Devise to A. in perpetuum paying 20*l.* per annum to X. and his heirs, and if A. should die without issue during the life of his brother B., then the estate to go to B. and his heirs.

Devise to A. and the heirs of his body, and if A. should die in the life of B. then the estate to go to B. and his heirs. A. suffers a common recovery in both cases, dying in the life of B. The sprite slaps his sword and lo! B. has an executory indefeasible devise in the first case, a defeasible remainder in the second.

And now, sir, with your leave we shall disembark from the ship of metaphor and alight on the dry land of ordinary language. I ask is the rock of technicality an overdrawn picture? are the colours too strong? the canvas too bright? On the contrary, will you not rather have to acknowledge that in confining myself to the law of realty as it now exists, and in furnishing the examples a layman's ignorance might suggest, I have come into court with the strongest facts unpleaded and

without one tithe of my witnesses prepared? Lend me but a small portion of that legal lore and acumen you have squandered so many years in accumulating, and then perhaps I shall be in some sort of position to unmask the gigantic evils our land law entails with such profusion upon the country.

Well may it be asked why we should so tamely submit to the dictation and tyranny of the lawyers? why we should not take up the matter into our own hands and fashion a rational code for ourselves? Let all disinterested persons enter into a mutual pact that they shall draw their own instruments and deal with their immoveables apart from professional aid; and let them bind themselves to refer all disputes to boards of arbitration consisting exclusively of ordinary laymen. Thus, as in time past, we made the law merchant; so now let us make a land law—the administration of which by our voluntary boards need not be prolonged beyond the period requisite for shaming the courts into the adoption of the new principles—an era it is to be hoped not coeval with the Greek kalends. Such is the course we shall be driven to, if parliament is unable to read and act upon the signs of the times.

I cannot conclude without obviating the only objections which can justify by an answer from you the continuance of a correspondence which, I humbly conceive, has already satisfactorily shown the absolute necessity and supreme advantage of adopting the scheme thrown out in my first letter. As in long and complex litigation it is the custom when beaten in Westminster Hall to fly to Lincoln's Inn Fields, so I presume you will dart towards equity now that law can no longer afford you protection. You will enlarge no doubt on the many mitigations—on the humane spirit—on the flexible character—on the remedial powers which Chancery flings as an ægis over the helpless suitor. You will remind me of those fundamental principles "Equality is equity"—"Equity considers as done what is agreed to be done"—"Equity never wants a trustee"—"Once a mortgage always a mortgage"—"He who seeks equity must do equity." You will then hold up to admiration—Wife's equity to a settlement—Vendor's lien for purchase-money—Mortgagor's equity of redemption—Equality of contribution amongst joint sureties—Administration of assets by equal distribution subject to the maxim Qui prior est tempore potior est jure—Defective execution of powers supplied—above all—the supremacy assigned to conscience! and then you will perhaps exultingly cry out: "Here indeed is true equity, a hundred times more than all the jus prætorium Romanum introduced adjuvandi vel supplendi vel corrigendi juris civilis gratiâ."

Yet how lamed and maimed is this boasted equity jurisprudence! One of its primary maxims is—Æquitas sequitur legem—and I can give you no better instance of the harshness with which this principle works than the unflinching adherence the creation and devolution of trusts have to those of legal estates. The dreadful range of the rule in Shelley's case re-appears; and if you were minutely to examine the rock of technicality you would find the spikes in the trust department almost exactly answering to those in the legal, except in the matter of executory trusts, where "heirs" and "heirs of the body" cease to be words of limitation, though if you have the misfortune to "make yourself your own conveyancer," up jump the spikes again with all their horrors, even in executory trusts—as if the lawyers must thus needs avenge the nominal invasion of their province!

Another maxim—"the equities being equal the law shall prevail;" and so down to the year of grace 1874 the third mortgagee without notice could, by buying in from the first, diamond cut diamond in between the second! And well were it if all similar injustice received a statutory coup d'état like to that of tacking. Then as to the nature of trust estates: recollect the anomaly and unfairness with which the he-chancellors helped themselves and their sex to tenancies by the curtesy, whilst they left the ladies to starve, without a morsel, until at length the legislature, without giving them "women's rights," at least gave them women's estates in the shape of equitable dower. (3 & 4 Will. 4, c. 105.) And for the vendor's lien. Is it just the taking of other securities should not ipso facto displace the right? What an extravagant rule in satisfaction that the legitimate should be in a worse position than the illegitimate child! This is surely leaning against the common dictates of humanity as well as "leaning against double portions." With what uxorious and filial solicitude have those children of iniquity—the equity judges—supplied the defective execution of powers! for whilst they are ever ready to assist the appointment of husband to wife, father to child, they never raise a finger to aid the appointment of wife to husband, child to parent!

Of the worship paid to conscience the less said the better—in one word, however, the whole race of hypocrites are left miles behind by the colossal impostures prescribed in the chancery creed. It was said by Selden the chancery conscience varies with the size of the chancellor's foot. "One chancellor has a long foot, another a short foot, a third an indifferent foot. 'Tis the same in the chancellor's conscience" (Table Talk). Well that was bad enough; but it is ten times worse to have

a conscience that hardly varies at all, compounded out of all the chancellor's feet that have ever reposed beneath the woolsack!

I might adduce other facts which would easily prove that all the good is counterbalanced by the evil of equity; nay, that in some instances as in that of terms attendant upon the inheritance, where the pure form of chattels has been immersed in the foul laver of freeholds, equity has outstripped the absurdities and monstrosities of law.

My previous observations are strong enough to cut off the retreat you would beat to equity jurisprudence—and I can think of but one other defence you will rely upon for the maintenance of the law of immoveables and its villanous technicalities—and a very weak defence it is. You will perhaps urge that, though the million are in a trackless country, the "profession" can tread all its mazes with ease and rapidity; that therefore our land law is not beyond rescue. A pretty consolation indeed! and a very humble demand that we should forsooth bind ourselves hands and feet in order to supply a lucrative avocation to those who get their living by guarding and leading the captives. But, may I inquire, what is the superlative necessity for this gratuitous captivity, even supposing our gaolers are able and willing to discharge their duties in the most efficient manner? Yet such a supposition will not hold water for a moment. There is not, nor has been, nor, if things remain as they are, shall there ever be such a prodigy as a lawyer who knows the whole law. Do not start nor be incredulous. I am not come like the unfortunate scoffer at the scintilla juris without authority. "The most perfect and absolute work that ever was written in any human science" —is the mode in which Sir Edward Coke (Co. Litt. preface) characterizes the Tenures of Littleton; but such hyperbolic eulogia must not blind us to the equal or rather superior merits of the great commentator himself—for you will doubtless admit his lordship is incomparably the greatest master of English jurisprudence that has ever appeared. Now let me relate a little anecdote I am sure you have often before heard. On his second marriage with the relict of Sir William Hatton, the sister of Thomas Lord Burleigh, Coke had the ceremony performed in a private house without banns or licence. A prosecution was in consequence commenced at the instigation of Archbishop Whitgift against him and the family of his wife in the ecclesiastical court. In answer to the charge the learned accused pleaded *ignorance* of the laws!

There! I have redeemed my promise and you are as much

out of court as the serjeant would have been could an authority of equal weight have been advanced against the doctrine of scintilla juris.

Hoping with this last spark the darkness of your mind may be illumined, believe me

Your obedient and faithful Servant,

JOHN DOE.

Richard Roe, Esq.

BLACKACRE.
Manor of Sale.

DEAR DOE,

Nil admirari prope res est una, Numici,
Solaque, quæ possit facere et servare beatum.
Hor. Ep. 6, Lib. I.

Your acquaintance with Horace permits—and my unwonted discomposure obtrudes—the quotation. Obtrudes, I say, for never before did any fact bring home the truth laid down by the satirist with such force as the undreamed event of good Jack Doe turning Æsop or Phædrus!

Why, if ever there was—surely you are a born—"Our own special foreign correspondent!" After your last note I would back you against all the world for telling a thumping good—— well no matter; and having always a large and varied stock upon hand. And the beauty of your lying acquirements is the artistic manner in which you interweave truth with falsehood, so that it becomes as difficult to discern the genuine character of the embroidery as it is to distinguish first-class imitation, from real, lace. Unfortunately mine is a practised eye; and at a glance I recognize, in the circumstantial details of the anecdotes you have narrated, the press-mark and stamp of veracity; whilst in those diluted haerangues against the abstruseness and technicality of the fundamental principles of the law, I perceive but the unsubstantial effusions of the fabulist and fiction-writer.

Science is a forbidden theme: but you will still allow me, I trust, to possess some small remnant of those primary rules of literary composition I was taught in my childhood. This indulgence conceded, I shall beg leave to repudiate the outrageous liberties you have taken with every figure of speech—liberties, you are to understand, which, if you are a member of the republic of letters, would inevitably, if brought under

notice, denude you of citizenship. Beef we all are glad enough to have: but we want no such Irish bulls as diving to the depths of the law, which after all proves to be rugged and stupendous rock.

Yet I could forgive so glaring an anachronism, but misrepresentation I cannot forgive. How dare you, sir, metamorphose the haven of order into the rock of technicality and the sea of confusion into the rock of simplicity? But see your inconsistency! The rock of technicality it appears is covered with ravines and mountains as unscalable as the Alps; and because death and danger wait on every footstep, therefore must all manner of abuse be heaped upon those excellent guides, who at great risk to themselves have by dint of bravery and perseverance, made themselves acquainted with every nook and pass, by which a safe transit may be accomplished. And then, you have given us a very mutilated rock of technicality; for, if you will so transform the haven of order, you must add on several snow-capt summits for the intricacies of personal property, criminal jurisprudence, and other branches of the law.

Take a few of the simple distinctions between the ownership, right of possession, and possession of goods:—The owner of Pheasant View starts a grouse in his own land and shoots it whilst flying over Partridge Lawn, his neighbour's ground, where it drops dead:—A poacher starts a hare in Partridge Lawn and kills it in Pheasant View:—A trespasser starts a rabbit in Pheasant View and there destroys it.

Is it so very easy to determine in these respective cases that the property in the grouse is in the owner of Partridge Lawn; of the hare in the poacher; of the rabbit in the owner of Pheasant View?

Then you have heard of a "loose fish;" but it is no child's play to distinguish it from a "fast fish." Kateios is the first to strike, but his harpoon breaks, and, whale number 1 being almost dead, Belosus is easily able to hurl his harpoon and secure the prize. Kateios strikes at whale number 2, which breaks away almost uninjured, leaving Kateios' line and harpoon safe. Belosus with great difficulty effects a capture owing partly to the wound inflicted by Kateios and to the animal being somewhat entangled in his gear. In the first case the fish is "loose" and the property vests in Belosus; in the second case the fish is "fast" and the property vests in Kateios.

Perhaps you would be glad to be told how a man may make himself a present of venison. Suppose then there are deer which go as appurtenant to a park. So long as attached thereto

they are of course chattels savouring of the freehold, and will devolve upon the tenant for years, for life, in tail, or in fee, for periods corresponding with their respective estates. Our venison aspirant then comes and chases away or kills one of the herd; and in consequence the property in this animal vests in the first freeholder, who has an estate of inheritance in the park, just as timber wasted by felling would do. The venison gentleman, however, labours under a peculiar inability accurately to discriminate between the opposed members *meum* and *tuum* and accordingly retains the booty. Thereupon the inheritor brings trover and recovers but never receives a farthing damages. With that recovery the venison is at last secured to the individual of peculiar inability.*

Let us glance for a moment at the simplicity of a bargain and sale of chattels. Equinus agrees with Hippios to buy three horses on the following terms, viz.: Bucephalus for 1000*l.* down: the brother of Bucephalus for 10,000*l.* at one month's credit: the sister of Bucephalus, when she is broken in and taught all the graces of the turf, for 50,000*l.* The Bucephali were left in possession of Hippios, but unfortunately the brother of Bucephalus died immediately after the sale, and the sister just as Hippios had her in trim order for delivery after great outlay in training. Hippios refused to part with the remaining member of the family, though he made Equinus shell out the 10,000*l.* at the expiration of the month—so far consoling himself for the disappointment of losing the 50,000*l.*

This is the easiest example that could be given; but I am inclined to think it shows—without referring to sales by bulk or from warehouses or wharfs—that the passing of property in chattels personal is not one of those things generally known by direct intuition—a further confirmation of which opinion may be noticed in the impossibility of making a gift inter vivos, except by deed, of a moveable already in and remaining in the possession of the intended donee.

Then as to other portions of the law: Lucifer brandishes a fiery sword within the millioneth of an inch of Michael's nose; and is guilty of an assault. Iris touches but the outside nap of Milo's outermost of outside coats, and is guilty of assault and battery.

Paul pleads payment of 4*l.* 19*s.* 11¾*d.* in satisfaction of 5*l.* due on the day of payment; Moses pleads payment of ¼*d.*

* Our venison friend must be supposed to have ceased living at her gracious Majesty's expense—the larceny suspending the civil remedy until that necessary sojourn was accomplished. We might assume he was mad and dispense with the former supposition, though apparently there would be method in his madness.

obtained by creditors' request from the pawnbrokers round the corner in satisfaction of 10,000*l.* due the same day. On demurrer judgment is given against Paul for Moses.

Housemaid receives parcel of new plate from the silver-smith and without hesitation appropriates spoons, forks, tea, coffee and dessert services, in fact, every single thing except a small salt spoon, which fell out by accident, and which the butler found and appropriated. They were subsequently duly indicted for larceny; and on true bills being found the housemaid was ordered to be discharged, but the butler was tried, convicted and sentenced to seven years transportation.*

William Swindlum, observing a clerk hastening through Lombard Street towards the Bank, adroitly relieved him of bills and notes to the value of half a million. Richard Pickpocket, having witnessed the feat and being fired with emulous zeal, made an instant swoop on a likely-looking old gentleman, who happened to be passing towards Broad Street, obtaining for his trouble a huge roll of pink and blue printed forms of cheques, bills, notes, &c.—all of which, however, turned out to be either unstamped or unindorsed and worthless except for what the rag-dealer would give for that or any similar amount of ordinary waste paper. It was not long after the acuteness of detectives and the vigilance of police had been polished up by the offer of a princely reward for the apprehension, when the two culprits stood in the dock of the Old Bailey. They were arraigned at the same time, and each pleaded Not guilty. The judge was a man of a stern disposition, and when he had to pass sentence he could do so with a will: yet could nothing on earth ever induce him to forego the smallest formality—no, not if the prisoner's guilt were clearer than the noon-day sun; the slightest flaw in the evidence would with him ensure an acquittal; for, he would ever rejoin to the prosecution,—Non refert quid notum sit judici si notum non sit in forma judicii. On the present occasion the crown, as became the dignity of the Bank of England, was represented by a tremendous bar. The Attorney-General—the Solicitor-General—one of the late government's law officers—several Q.C.'s—and the most distinguished of criminal juniors—were all retained; for the Treasury had taken the matter up with such warmth, that no counsel of any great name in this line of business was left for the defence. Under these circumstances Swindlum, who could well afford to pay for the best professional assistance still to be had, thought he might as well fight for himself; whereas Pick-

* Under 24 & 25 Vict. c. 96, s. 72, the housemaid would now be convicted of embezzlement.

pocket's fortunes were committed to an eminent "counsellor" (who by the way had stood sixteen times for parliament without getting in), whose fee, though in all conscience moderate enough, had been squeezed together by a general impoverishment of the accused's relations and friends. The judge, seeing the principal prisoner undefended and believing the cause to be poverty, requested a hitherto briefless and unfledged barrister to afford his services gratuitously. Swindlum did not much care for this interference; but, his mode of life having rendered his perceptions singularly quick, he saw in a twinkling his lordship was anxious to bring forward a favourite; and thereupon with the most becoming of bows acknowledged the kindness so unexpectedly received. The stuff-gownsman now rose and requested the indictment might be again read over—which was forthwith done. Upon that he asked leave for the prisoner to be allowed to withdraw his plea of Not guilty. When this proposal was heard a general hubbub of disappointment ran through the crowded court, which was filled to overflowing by merchants, tradesmen, gouty old noblemen, and frights of hideous dowagers, who, all in turn victimized by the wild animal at length apparently at bay, had assembled with savage glee to hear the majesty of the law, and, still more, their own respective wrongs vindicated by the combined eloquence and indignant denunciations of the leaders of the bar. Nor was the expected confession more agreeable with the big whigs, most of whom had gloated over the thought of having each syllable of their elaborated addresses or interrogatories flashed on the electric wires to the utmost corners of the globe. But what was the consternation of the law officers of the crown! Proh Dii immortales! burst out the Attorney-General, who, besides the Catiline Orations, had so pounded over the speech against Verres that he absolutely believed himself, not a second, but the real actual Cicero, once again in the flesh, and was firmly persuaded that, as the last word of his peroration still sounded, the audience would rise up to a man and hail him "Father of his Country." "Each scabbard would have leaped from its sword," muttered the Solicitor-General, who had so often mentally impeached Warren Hastings as at length to have become somewhat regardless of the order of language Burke observed in that or any other speech. Then whispered the big wigs, loud enough to be heard by everyone, "Nothing to be gained; seven and ten years previous transportations; this time pretty safe for life!" The young barrister, however, persisted in his demand; and the judge reluctantly but eventually with his usual courtesy granted his consent. Thereupon this junior of juniors

turning to the bench said: "I believe, my lord, I can save your lordship and the jury a great waste of time by putting in a demurrer on the prisoner's behalf. This indictment is bad upon the face of it, for there can be no larceny of a security, and therefore I submit with confidence the prisoner must be discharged."* The judge looked at the Attorney-General; the Attorney-General at the Solicitor-General; the Solicitor-General at the law officer of the late government; this latter at his immediate subordinate,—until at length the look was passed to the lowest junior, from whom it was duly transmitted to the solicitor of the treasury, who devolved it to his head clerk, and this last was so petrified as to be unable to get rid of the burden. The fact was, everybody had relied on everybody else for the law of the case—each counsel (they had all had a hand in drawing the accusation) being absorbed in marshalling the facts he would most likely have to examine and cross-examine upon.

The silence produced by the surprise was at length broken by the judge. "Mr. Attorney," said he, addressing the chief law officer, "do you maintain the sufficiency of this indictment?" "No, my lord," was the brief and emphatic response. "Then," resumed the court, "let the prisoner be discharged."

On his liberation, Swindlum, instead of departing with all convenient speed from the scene of his recent jeopardy, in a few minutes appeared amongst the body of spectators, twirling his cane in the most unconcerned manner imaginable; thinking, as the day was now too far spent for serious application to business, he might as well wait and see what would be the fate of Pick-pocket. The case of this hero was already proceeding, and the old gentleman had just appeared in his shirtsleeves in the witness box to show the jury where the young ruffian had so cleverly ripped open his pocket. With this the evidence for the prosecution closed. There was and could be no real defence, so clearly was the offence brought home; and after a tedious oration from the "counsellor," and a brief summing-up from the judge, the jury without retiring immediately found a verdict of guilty.

It then appeared the prisoner had commenced his career at nine years old and been convicted of purloining a valuable silk pocket handkerchief from a flushed-looking alderman, when with delicious prospect entering his carriage en route for a sumptuous dinner, at one of the worshipful city company's. At the expiration of his month, nothing daunted, he betook himself to his old ways and for two years carried on a most lucrative

* By 24 & 25 Vict. c. 96, s. 27, securities are now the subject of larceny.

trade in marauding about the Exchange and Cornhill. He would probably have long flourished in that line, had he not unfortunately levied black mail on the Lord Mayor himself, just as that worthy was leaving the Mansion-house, when he succeeded in filching what appeared an extremely elegant piece of bonnet ribbon, but which in fact was an order, received from one of the Indian princes, whom the civic dignitary was to entertain at a grand banquet in the Guildhall during the following week. The Lord Mayor, who had fully intended to sport his rank on the occasion in question, was in the most dreadful state. All the power at his command was put in motion to discover the thief and recover the stolen property. His efforts were rewarded with success. Pickpocket was sent to a reformatory for five years; and so delighted was the Lord Mayor at getting back his order, that, besides telling his guest some fifty times over of the happy termination of the mishap, he was within an ace at three or four different periods of proposing and drinking the health of—"Our worthy force—the police!"

The reformatory had been left only a few months; yet in so many places was Pickpocket "wanted," that, were all those seeking him to be satisfied, something of the same contention as has taken place in past ages for the corpse of a saint or other illustrious personage might well have been apprehended. Under all these circumstances the justice of the case was met by a sentence of ten years' penal servitude, with five years' police supervision—the judge observing it was not the prisoner's fault he had not obtained actual securities and got off like Swindlum, who thereupon made a gracious obeisance and wended his way homewards.

John Keech, Esq., in shooting at his fowl on his own ground, missed aim and killed Moribundus. He got off on a plea of excusable homicide. Mr. Keech, in shooting at his fowl just beside the highway, missed aim and killed Moribunda. He was convicted of manslaughter.

Jack Keech, in shooting at Hangum's fowl in a lonely part of his own ground, missed aim and killed Moriturus. He was found guilty of murder!

I might give endless examples from other portions of the law which would demonstrate how shorn and misleading is your rock of technicality, when restricted to real property. Nor is English jurisprudence peculiar in possessing artificial and difficult distinctions. The same fact is and must be true of all jurisprudence, which, in laying down general rules, opens a boundless field for judicial interpretation. So self-evident a

proposition stands in need of no general confirmation, and I shall therefore adduce some very trite instances from Roman law—not as proofs but as illustrations.

The intricacy of the ancient legis actiones may be gathered from the rigid adherence which had to be paid to the sacramental forms and words. "Unde cum qui de vitibus succisis ita egisset, ut in actione vites nominaret, responsum est, eum rem perdidisse, quia debuisset arbores nominare, eo quod lex XII. tabularum, ex qua de vitibus succisis actio competeret, generaliter de arboribus succisis loqueretur." (Gaii Insts. iv.) May not the nicety of the variance between trees and vines in the ancient Roman system be well matched against the nicety our law recognizes between direct and consequential damage in trespass and case respectively?

(1) Titius hominem Stichum capito.—(2) Titius hominem Stichum præcipito. Here is the legacy of a slave bequeathed —per vindicationem in the first instance—per præceptionem in the second. Such was the doctrine of Sabinus, Cassius, and the other members of the school to which Gaius belonged, who held that none but a co-heir could take per præceptionem; whilst a stranger to the will could take per vindicationem. On the other hand Nerva, Proculus, and the rest of the opposite school, rejected the prefix præ and considered both forms as bequests per vindicationem.

Again, there were various forms of the verbal contract:—Dari spondes? spondeo.—Dabis? dabo—promittis? promitto, &c., and generally these forms might be expressed in Greek if the parties understood that language; as, δώσεις; δωσω· ὁμολογεῖς; ὁμολογῶ, &c., and contracts thus formed were valid, whether amongst citizens or peregrini. But the form—Dari spondes? spondeo—was so peculiar to Roman citzens, that it was binding only, when both parties were citizens and had employed these identical words—"At illa verborum obligatio dari spondes? spondeo, adeo propria civium Romanorum est ut ne quidem in Græcum sermonem per interpretationem proprie transferri possit, quamvis dicatur a Græca voce figurata esse." (Gaii Insts. iii. 93.)

The construction of the phrases—"after my death"—"on my death"—and "the day before my death"—is worthy of regard. Thus a promise to make a conveyance on one's death was good; but a promise to convey after one's death or the day before one's death was bad; because, in the first instance, the obligation was considered to be merely deferred to the last moment of the promisor's life and to attach to him, whereas, in the second, the obligation would attach only to the heir of the

deceased—to allow which the jurisconsults thought would have violated the genius of their system. To convey on the day before one's death was virtually for the heir to convey after one's death, since it was impossible to ascertain the day preceding a man's death until he had died. "Denique inutilis est talis stipulatio, si quis ita dari stipuletur: Post mortem meam dari spondes? vel ita: Post mortem tuam dari spondes? valet autem, si quis ita dari stipuletur: Cum moriar, dari spondes? vel ita: Cum morieris, dari spondes? id est, ut in novissimum vitæ tempus stipulatoris aut promissoris obligatio conferatur: nam inelegans esse visum est, ex heredis persona incipere obligationem. Rursus ita stipulari non possumus: Pridie quam moriar, aut Pridie quam morieris, dari spondes? quia non potest aliter intelligi pridie quam aliquis morietur, quam si mors secuta sit; rursus morte secuta in præteritum redducitur stipulatio et quodammodo talis est. Heredi meo dari spondes? quæ sane inutilis est." (Gaii Insts. iii. 100 et seq.)

When shall a thing be deemed "principal" when "accessory?" Is there no technicality here? If you write even in letters of gold upon my parchment, the parchment will still remain mine; but if you paint a picture on my canvas, the canvas becomes yours—it being understood in both cases you act bonâ fide, believing the parchment and canvas to belong to yourself: "Probatum est, quod in chartulis sive membranis meis aliquis scripserit, licet aureis litteris, meum esse, quia litteræ chartulis sive membranis cedunt. Sed si in tabula mea aliquis pinxerit velut imaginem, contra probetur magis enim dicitur, tabulam picturæ cedere; cujus diversitatis vix idonea ratio redditur." (Gaii Insts. ii. 77.)

Again, to distinguish—between purchase and sale on the one hand and hiring and letting on the other—turns sometimes on very subtle considerations: "Si cum aurifice mihi convenerit, ut is ex auro suo anulos mihi faceret certi ponderis certæque formæ et acceperit verbi gratia trecenta, utrum emptio et venditio sit an locatio et conductio? Sed placet unum esse negotium et magis emptionem et venditionem esse. Quod si ego aurum dedero mercede pro opera constituta, dubium non est, quin locatio et conductio sit." (Dig. xix. ii. 2.) In a case exactly similar to this, Cassius considered the transaction divisible, *i. e.*, that there was purchase and sale of the material —hiring and letting of the services—but the general current of authority was that above stated. (Gaii Insts. iii. 47.) So an agreement, that, of the gladiators I deliver to you, I am to receive so much for each that is slain and so much for each that escapes intact, was construed to be a case of purchase and sale

in the instance of the former and of hiring and letting in that of the latter. "Si gladiatores ea lege tradiderim, ut in singulos, qui integri exierint, pro sudore denarii xx mihi darentur, in eos vero singulos, qui occisi aut debilitati fuerint, denarii mille, quæritur, utrum emptio et venditio an locatio et conductio contrahatur: et magis placuit, eorum, qui integri exierint, locationem et conductionem contractam videri, at eorum qui occisi aut debilitati sunt, emptionem et venditionem esse; idque ex accidentibus apparere, tamquam sub condicione facta cujusque venditione an locatione; jam enim non dubitatur, quin sub condicione res veniri aut locari possint." (Gaii Insts. iii. 146.)

Thus Roman as well as English law—as well as the law of every country—has its technicalities; and, if you attack our real property on this score, you must be prepared to show that it involves needless or baneful intricacies.

I presume those various rules you have alluded to as entering into the composition of your rock of technicality are brought forward in order to meet with animadversion—the strongest and most relentless; and that, if I point out how undeserved and misplaced such animadversions would be, I shall have done all to rescue you from a forlorn frame of thought, the office of a friend requires.

How hard it is to say:—"I was wrong"—and what sacrifices some people undergo rather than make the admission! Would it not have been better to own like a man that your ribald attack upon technical terms was without foundation, and that you withdrew the opprobrious observations you had given utterance to. By so simple an expedient you could have become reconciled with the word "purchase," and so rendered yourself intelligible. But, rather than stoop to an honourable confession, you have worn and wearied yourself in the hopeless endeavour to express by lengthy circumlocution an antithesis, cut with chisel edge by the consecrated and concise phraseology of the law. "Heirs," or "heirs of the body," are either words of purchase or words of limitation—speak in that language, and, though the range of the rule in Shelley's case were extended over a whole continent, we should have little to fear from what would then be its cork-stopped spikes.

I shall not deign to defend the sublime rule in Shelley's case by giving you the sentiments of the pillars of the law, to whom I refer you, especially the authority on contingent remainders. But hoping you may become one of those who "came to scoff, remained to pray," I shall cite an early case: "John Abel having two sons, Walter and John, purchased the manor of Fortysgray in Kent; to hold to himself and Matilda his wife,

and Walter Abel his eldest son, and to the heirs of the body of Walter begotten; and, if Walter died without heir of his body, the manor should remain to the right heirs of John the father. Matilda the wife died; and Walter the son also died without heir of his body. John the father became bound in a statute merchant to pay 100*l.* to B. at a day certain; and died leaving his younger son John his heir. After the day of payment was elapsed, the creditor sued out a writ to the sheriff of Kent, to extend and deliver to him all the lands which John Abel the father had, on the day of acknowledging the statute. The sheriff returns, that he had delivered to other creditors upon recognizances all the lands which John Abel had in fee, except the manor of Fortysgray, in which he had only an estate for term of life. Upon this return it was argued that John the father had only the freehold for term of life, the fee simple being limited to his heirs, who therefore took by purchase and not by descent, but the court held the contrary; for which this reason (among others) is given by Stonor, J., viz. *because otherwise* the fee and the right, after the death of Walter the eldest son, *would have been in nobody.* And therefore Beresford gave the rule, that execution should be awarded upon this manor of Fortysgray." (Maynard's Year Books, M. 18 Edw. II. fol. 577, Mr. Hargrave's Law Tracts, case of Perrin *v.* Blake.)

So superexcellent indeed has this principle proved itself, that it has been eagerly adopted into your favourite system of personalty, where a limitation by way of trust or executory devise of chattels to a man for his life, followed by a subsequent limitation in the same instrument to his executors, administrators and assigns, gives him the whole vested interest or interests—the words his executors, administrators and assigns being construed words of limitation.

I do not know if I need comment on the other districts of the rock of technicality you have shown me over. Across all of them I behold the straight roads of logic and consistency, along which the horsehair heads and snowy scarfs glide with the ease and nimbleness of the velocipede. You have evidently never been in a crowded building, when a cry of fire was raised, and, the doors opening the wrong way, there was no means of exit, until, just as the hungry flames were about to seize on the unhappy victims, a vent was opportunely burst through the Moody-and-Sankey-like confinement that hemmed in the pleasure-seekers to destruction. Even such was the vent afforded by the exhilarating doctrine of scintilla juris.—"Uses are frequently limited in contingency, to serve which, as they come in esse, it is necessary there should be a seisin somewhere.

When this case was first considered by the lawyers, it was found difficult to discover any mode of reasoning, consistent with the system generally received on the doctrine of uses, by which that seisin could be supposed to exist anywhere, or what the precise nature of it was. This was the great difficulty in Chudleigh's case. There, the following case was put. Suppose a feoffment is made to the use of A. during his life, remainder to the use of his sons successively in tail, and, for want of such issue, to the use of B. in fee; is there any, and what seisin, to serve the uses limited to the sons of A.?—In whom does that seisin exist?—and how does it operate? Upon this point the judges seem, by the accounts which have come to us of that case, particularly Sir Edward Coke's and Lord Chief Justice Popham's, to have held very different opinions. All agreed, that, to the execution of an use under the statute, it was indispensably necessary, that there should be a person seised to the use; an use in possession, reversion, or remainder; and cestuy que use in esse. From these positions, some of the judges in that case inferred, that the whole use was executed in A. and B. in a manner that left nothing of the ancient use in the feoffees; and that the contingent use, when it came in esse, was executed out of the first livery, and the original estate of the feoffees. Others held, that an *actual estate* in remainder was vested in the feoffees, to serve the contingent uses as they arose. But both these systems were found to be open to unanswerable objections. For, with respect to the first, one of the requisites indispensably necessary to the execution of an use, under the statute, is, that there must be a person seised to the use, at the time of the execution of it. Now, if the whole original seisin was divested out of the feoffees, there would not, when the son of A. was born, be any person seised to his use; —or, in other words, there would be no seisin to that use. This would make the estates limited to the sons of A., and all other contingent remainders, void in their creation for want of a seisin to feed them, when they come in esse. With respect to the latter system,—it is to be observed, that, under the limitations upon which the case arose, A. took an estate for life in possession, and B. took an estate in remainder in fee;—and that previously to the birth of A.'s children, there was no use vested in any person, which separated those two estates. Those uses, therefore, were commensurate to the whole fee, and admitted no opening for any intermediate vested use. Besides, the feoffor neither limited, nor intended to limit, any such intermediate use to the feoffees. Thus, on the one hand, the objection to the supposition, that nothing of the old seisin

remained in the feoffees, on the other, the objection to the supposition, that any use or legal estate remained in them, made it difficult to conceive what estate or seisin could be in them, to serve the contingent use. To clear up this difficulty it was observed, that the possession was not executed by the statute, but in the manner, and to the extent, in which the use was limited. Now, in the case we have mentioned the use was limited, and consequently the possession executed to A. during his life, remainder to B. in fee, but subject to the *possibility* of A.'s having sons, and their becoming entitled to the use, and consequently to the possession for an estate or estates in tail. Thus, during the suspense of the contingent use, the feoffees had a possibility of possession, untouched and unaffected by the statute, as there was no use in esse to which it could be executed. The moment the use came in esse the feoffees would be entitled at common law to the possession, to the use, or, as we should now call it, in trust for the cestuy que use; but by the operation of the statute, the possession is instantaneously divested from the feoffees, and executed in the cestuy que use. Thus, by supposing a possibility of seisin, but no actual seisin or use to remain in the feoffees, during the suspense of the contingent use, a sufficient seisin is provided to serve the contingent use when it comes in esse, without interfering with, or breaking in upon, the legal fee." (Co. Litt. Mr. Butler's note iv. 271 b.)

The "possibility of seisin" spoken of is otherwise called scintilla juris. "Not to cherish the scintilla," observes Popham, C. J., "would be to cast the whole commonwealth into a sea of troubles and endanger it with utter confusion and drowning." And then listen to C. B. Periam, who "conceived that these future uses before their births are not preserved in the bowels and belly of the land, but that they are in nubibus and in the preservation of the law."

You have alluded to a devise by way of use; and I am somewhat at a loss to understand how you would bring the 32 and the 34 Hen. 8 within the 27 Hen. 8, so as to throw a doubt upon the operation by intention.

Then the case of your friend Skinflint is extremely clear, being but an ordinary application of the statute, the uses under which are always served out of the seisin destined to feed them —a principle, from which no such hybrid as an estate created under appointment and clothed with the covenants entered into with the donee of the power could be bred.

With your magician Fearne I have no quarrel, only I am surprised you had not the frankness to admit that the terra periculosa of contingent remainders, conditional limitations,

and executory devises was thrown up entirely in the attempt to satisfy the peculiar idiosyncracies of owners in the disposition of their property.

I entertain no commiseration whatever for the surgeon, stockbroker, F.R.S., and other persons who reaped the fruits of their folly. Is it to be tolerated that any and every upstart and quack may with impunity meddle in the most recondite of sciences, whilst a special diploma is requisite to kill a patient, to do a capitalist, to humbug the world? "Familiarity breeds contempt," and, probably, on that account we have our amateur jurisconsults and our amateur divines. It is not every day we have a limb amputated or a planet discovered; and yet what poor philosophy to suppose the uninitiated know more of the candle flame than of the stellar beam! as if the art of the chemist was so simple compared with that of the spectro-analyst. The very fact that the lawyer's is not the common knowledge ranks jurisprudence with the profession of the surgeon, and the adoption of all these technical terms and technical modes of reasoning show how far the law has been developed and what an irreparable loss would ensue, if so many abbreviations and short-cuts and, yet withal, such unbending coupling irons were destroyed.

With what patience then can I listen to that preposterous scheme—that laymen should evolve a code for themselves. Such a proposal is no less sagacious than would be the proposition to burn our locomotives and steam-vessels, in order that we might return to horse-power and galleys! Indeed, those mechanisms are far less potent in the economy of material, than are the instruments of the jurisconsult in the economy of mental, labour. Nor can you undertake to furnish a better set of tools than those we already possess. Never was an act of parliament drawn with greater care and rarely by abler hands than those of Sir Matthew Hale, Lord Keeper Guildford, and Sir Leoline Jenkins. "Yet every line of the Statute of Frauds may with truth be said to have *cost* as well as in the words of the great Earl of Nottingham to have been worth a subsidy" (Smith's Contracts). Take but the 4th and 17th sections and see the enormous bulk to which the determination of their provisions has swelled. Nay, in the 17th section what endless interpretation of the terms "accept" and "receive" in the clause—"unless the buyer shall *accept* part of the goods so sold and actually *receive* the same"! How vain, then, to attempt a reconstruction of the language and law of real property!

There is, moreover, a very palpable fallacy in deriving an analogy from the success that attended the establishment of the

law merchant. Here the layman was successful because he was opening up entirely new ground. The earliest reported case on a bill of exchange is Martin *v.* Boure, 6 James 1, and it was not till 3 & 4 Anne, c. 9, the negotiability of notes was put beyond question, though these latter had been in circulation ever since the appropriation, by Charles I., of the deposits at the Mint, had driven the merchants to confide their treasures to the goldsmiths in Lombard Street, who devised the promissory instrument of credit. Indeed I need scarcely remind you that the law merchant dates from Lords Holt and Mansfield, and had its foundation laid by those eminent judges, sanctioning in their decisions the usages already prevailing amongst traders. Now there are many portions of that law which might be improved. Even the whole might be supplanted by a new and better system; but is it not manifest such a change would be wrought with infinitely more detriment than advantage, owing to the uncertainty that would arise, and from having to begin all over again and by a long series of precedents fix the meaning of the new rules on a steady basis? Yet the experiment in the case of the law merchant could hardly be so disastrous as in that of the law of realty; for trade is now in as high estimation as ever, and our lawyers, of the nineteenth, would devote quite as much pains to elaborate new rules of commerce as their predecessors did in the eighteenth, century; whereas land loses every age some of its original prerogative right to superiority, and the profession could never now bestow that undivided attention, by which during a long course of generations the law of immoveables was so grandly founded and so accurately ascertained.

"A little learning is a dangerous thing"—how noxious small draughts from the Pierian spring of equity may prove let no one hereafter be in doubt about! Who was it primed you up in the maxims and doctrines of the Court of Chancery, with that true-blue-grinder-touch-of-paper-and-ink statement unsupported by a single thought of depth or reflexion? No wonder you seem so much to approve of—when it is so evident you were born, or ought to have been, and lived every year of your life or ought to have done so—in your rock of simplicity. Very evil indeed is the maxim Æquitas sequitur legem, confining as it does with such effect the broad sea of confusion! Without doubt the devolution, quantity and quality of trust estates, has been fashioned after the pattern furnished by legal estates to the unfortunate diminution of obscurity and endless litigation! Did your grinder so far whet the obnoxious dullness of his disciple as, by explaining the limits of the maxim,

to afford a microscopic chance of comprehending some infinitesimal fraction of the sound principles upon which the chancellors have proceeded? You have stated like a parrot that the courts of equity insist on a strict settlement when the trusts are executory—not a single syllable on the reasonableness of making the children purchasers as being within the consideration of marriage, in the case of antenuptial articles, or of carrying out the intention of the testator in the case of devises! Then, we are not told where the maxim stops, so that for aught that appears to the contrary one might suppose an abeyance of the freehold or the want of livery of seisin would be as fatal to trust as to legal estates.

The interference of the legislature, I presume, has given you confidence in that ridiculous attack upon the honoured maxim—"The equities being equal the law shall prevail." "Would you be surprised to hear," that the interference was so profoundly wise that the legislature is at this present moment puffing and panting for the repeal of its eight months' old enactment.*

But let that pass. If you have ever read any constitutional history you ought to have known the wisdom of this principle, for the famous collision of the Courts of Chancery and King's Bench in James I. is not easily forgotten. Coke and Egerton, it is true, were personal enemies; but, without a circumstance of that kind, there would inevitably at some time or other have been a clashing of the common law and equity courts. Why should not the chancellors supplement the courtesy, which never pretends to enjoin the courts but only the parties, by allowing the law to avail when equitably both petitioner and respondent were on the same footing? There was a great saving of expense by this rule, inasmuch as a suitor who had both law and equity on his side had only to file a bill without also bringing an action—so common a necessity until the recent acts enlarging the modes of trial in chancery. Again, this rule was in perfect accord with the doctrines of equity which never carries the development of its creature farther than the object of its creation requires—a principle so well exemplified in the resulting trust to the heir or personal representative of the undisposed residue of real or personal property respectively ordered to be converted by a testator.

It is amusing to listen to those blatant denunciations against the favour shown to the illegitimate child, as if that did not result from the soundest doctrines. Perhaps you would like to hear what Glanville has to say upon the subject: "Sed nunquid

* Land Transfer Bill.

filio suo bastardo potest quis filium et heredem habere de hereditate sua donare? quod si verum est, tunc melioris conditionis est in hoc bastardus filius quam mulieratus postnatus, quod tamen verum est." (Book vii. ch. 1.*)

Nothing can be more rational than the supposition that a parent is bound to provide for his child; and is there anything monstrous in holding he is not bound to provide twice over? The court then gives effect to the presumable intention and carries out the duty but does not superadd generosity. That other case you have cited—defective execution of a power not aided in favour of a parent—is grounded on the converse of the foregoing reason—viz. that there is no primâ facie duty on a child to provide for its parent. As a further example of these doctrines, I may instance a purchase by father or husband in name of child or wife where the nature of the transaction gives the nominee the benefit of the trust, that would otherwise result in favour of the person from whom the consideration moved, being thus rebutted.

"Thus conscience does make cowards of us all!"

a suitor might well exclaim, if your views, or rather the hints thereat (for you dare not speak plainly), were carried into operation. You do not suppose it is the business of a civil tribunal to judge as a moralist would—in foro conscientiæ? nor would it be desirable that the rationes decidendi should be constantly changing, for, optima est lex quæ minimum relinquit arbitrio judicis. Then, what is the meaning of assailing and bawling out at that healthy conscience of chancery, which has been so long reaching its normal stature! One reason and one reason only suggests itself. Conscience has not the same signification in equity as in morals—to the puerility of which I answer: Neither does the "charity" of the Christian correspond with the "charity" of 43 Eliz.

I congratulate you on the lesson you have learned from the discussion of the scintilla juris; but I fear had I been the serjeant your authority would have been of little use.

That no lawyer ever knew the whole law, I am quite ready to grant, just as no medical man ever knew the whole of physiology—anatomy—surgery and medicine; as no natural philosopher ever knew the whole of mathematics—astronomy—

* Glanville said, a line above, that an owner of *inheritable* land could not dispose even of a part thereof to younger children—because parents having stronger affection for their latest born would be induced to cut out altogether the eldest son. Bastards are incapable in Regiam Majestatem, L. ii. c. 19, and Grand Costumier of Normandy, c. 36.

acoustics—optics, &c.! Why this very objection is a singular praise, showing how our lawyers have specialized their subject and therefore brought it to a forward stage!

Moreover it is the glory of the law to have a wealth of distinctions the veriest miser could never count or estimate, for through their multiple instrumentality may a nearer approach be made to distributive justice. Besides, it would be a great misfortune if the law were thoroughly known; for then you would have forgers, thieves and the evil-disposed in general cutting their cloth accordingly and marauding with impunity. Why have the courts in the matter of fraud and contempt, and the houses of parliament in the matter of privilege, abstained from laying down any hard and fast definitions? Why, but because in so doing they would be binding themselves hands and feet in enabling wrongdoers to steer clear of punishment, so long as they took care to keep beyond the reach of the inextensible and visible fangs of the law.

"Semel emissum volat irrevocabile verbum."

Recall the truth and be wise. Persist not in chronicling your own folly by the continuance of a correspondence, which each post proves to be so futile. Acknowledge the grossness of your errors and no one shall know (for I shall keep it secret) all the nonsense you have been talking to

Your interested and much-concerned friend,

John Doe, Esq. RICHARD ROE.

P.S.—It has just occurred to me it might be a useful mental tonic if you were to sit down and try your hand at drawing a conveyance without technical terms or rules. The abortiveness of the attempt will confirm you in the belief of the absurdity of your past proposals.

N.B.—You know you need not send me an account of your discomfiture. I shall understand that without the painful admission.

WHITEACRE,
Manor of Dale.

Dear Roe,

Did you ever give the tinker a leaky kettle or porous saucepan to mend? If such has been your happy lot, just be good enough to recal the result of the manipulation. For every old hole stopped up, I'll go bail you had two brand-new ones knocked in; and fortunate was your penny-wise-pound-foolish economy, if it did not prove a burning sore in a literal, as well as metaphorical, sense. Now, Richard Roe, learn I am no tinker and shall take no tinkering job from any man—be he high or low—rich or poor. My business is to furnish articles of the newest and most approved style; and, if the customer does not choose to have them as they are, he is at liberty to leave them. Therefore dream not that I shall meddle with that rickety concern—the law as you would have it. Of my merchandise—all or none!—Aut Cæsar aut nullus! You shall not inveigle me into dishonourable compromise, and if, in answer to your compassionate exhortation, I show how simple the transfer of land might be made, you are to bear in mind I am exhibiting, of a larger parcel of wares, a specimen—not to be sold apart from the general bulk.

Nothing can be more proper in striking a bargain for replacing an antiquated and worn-out piece of goods than to estimate the value and necessity of the investment by the inefficiency and discomfort of the thing replaced. To this normal let us reduce the necessity of substituting the present system of conveyancing, and we shall have to admit that no cost could be too much—no urgency so pressing. If you have ever seen a ruinous and tumble-down building being taken to bits, you must have observed the caution with which the workmen proceeded, first, to examine the whole structure and, then, slowly to pick out, jot by jot, stone, brick, and mortar. In self-protection, I must adopt a similar course in overthrowing the present system of land transfer; for, unless I make a preliminary survey of the whole subject and go gradually to work, I shall pull the entire edifice about my ears—such is its cohesive rottenness.

There is one feature in our conveyancing which, by its disfigurement and prominence, forces itself on our first notice. I of course allude to the general necessity of employing a deed, when any dealing with immoveables takes place inter vivos. The ancient rule of the common law was, that all hereditaments—as corporeal or incorporeal—lay either in livery or in

grant, respectively; but, since the passing of the 8 & 9 Vict. c. 106, a lease for any term not exceeding three years from the making thereof, whereon two-thirds of the full improved value shall be reserved as rent, is about the only interest in land, that can be created or aliened without a specialty. Perhaps in the retention of deeds in the nineteenth century, the buffoonery of the law has gone the utmost length the tether of extravagance will admit. To think that the ancient barons were unable to write their own names is anything but pleasing: to read that they gloried in their own illiterate barbarism is indeed humiliating; but to say that we should canonize that barbarous ignorance, by enlarging the sphere and operation of sealed instruments, is almost too monstrous for rational belief! Do the descendants of a burglar raise up a monument to their ancestor with the sculptured effigy of crowbars and jemmies? Or are a halter and gallows assumed as coat of arms by the offspring of an executed progenitor? It is without precedent then—and precedent I have been always told has much weight in the law—we hand down, in the seal affixed to documents, the disgraceful emblem and proof, that those who have gone before us were incapable of subscribing in their own hands.

You remember how that form of theft mentioned in the Twelve Tables—Furtum lance licioque conceptum—meets with the deserved ridicule of the jurisconsult and became obsolete:—"Quare lex tota ridicula est; nam qui vestitum quærere prohibet, is et nudum quærere prohibiturus est, eo magis quod ita quesita res inventa maiori pœnæ subjiciatur. Deinde quod lancem sive ideo haberi jubeat, ut manibus occupantis nihil subjiciatur, sive ideo, ut quod invenerit, ibi imponat, neutrum eorum procedit, si id quod quæratur, ejus magnitudinis aut naturæ sit, ut neque subjici neque ibi imponi possit." (Gaii Insts. iii. 193.) Yet there was assuredly in the time of the Decemvirs sensible ground for this peculiar formality, not stupidity, pure and simple, like that of our ancient landowners. And what renders the use of sealed instruments still more nonsensical is, that their general introduction as to the matter of land is due to that very statute, which, in sweeping away the necessity of actually indenting paper or parchment where there were several parties to a transaction, appeared to be emancipating us from the slavery of ancient forms. Thus in the formality of our deeds a foul blot already bespatters the garb of our conveyancing; but now let us rapidly inspect the entire system.

All conveyances are either—

I. Conveyances inter vivos, or—

II. Conveyances ex testamento.

I. Conveyances inter vivos fall under—

1. Conveyances at common law. 2. Conveyances under the Statute of Uses. 3. Conveyances through the joint operation of the common law and the Statute of Uses. 4. Conveyances through the Court of Chancery. 5. Conveyances by judgment and decree. 6. Conveyances under general acts of parliament. 7. Conveyances under special acts of parliament and royal charters and letters patent. 8. Conveyance through Landed Estates Court (Ireland). 9. Conveyance by means of registration.

1. Conveyances at common law are—
   (A.) Ordinary assurances or assurances in pais.
   (B.) Extraordinary assurances or assurances by matter of record.

(A.) Ordinary assurances transfer (a) Freeholds and leaseholds—(b) Copyholds.

Ordinary assurances for transfer of freeholds and leaseholds were — 1° Feoffment with livery of seisin. 2° Exchange. 3° Partition. 4° Lease. 5° Release. 6° Surrender. 7° Confirmation. 8° Grant. 9° Assignment. 10° Disseisin, abatement, intrusion, deforciament, usurpation, purpresture. 11° Discontinuance. 12° Disclaimer. 13° Defeasance.

Of these in order; and first, Of feoffment with livery of seisin: "For if a man purchase lands by these words, To have and to hold to him for ever; or by these words, To have and to hold to him and his assignes for ever: in these two cases, he hath but an estate for term of life, for that there lacke these words (his heires), which words onely make an estate of inheritance in all feoffments and grants." (Litt. Tens. L. 1, c. 1, s. 1.)

"In all feoffments and grants." 'Feoffment is derived of the word of art *feodum, quia est donatio feodi*; for the ancient writers of the law called a feoffment *donatio*, of the verb *do* or *dedi*, which is the aptest word of feoffment. And that word Ephron used (Genesis xxiii.), when he enfeoffed Abraham, saying, I give thee the field of Machpelah over against Mamre, and the cave therein I give thee, and all the trees in the field and the borders round about; all which were made sure unto Abraham for a possession, in the presence of many witnesses.

'By a feoffement the corporeate fee is conveyed, and it properly betokeneth a conveiance in fee, as our author himselfe hereafter saith (s. 57), in his chapter of Tenant for Life. And yet sometime improperly it is called a feoffment when an estate of freehold onely doth passe: done est nosme generall plus que

n'est feoffment, car done est generall a touts choses moebles et nient moebles, feoffment est riens forsque del soyle (Britton, cap. 34)." (Co. Litt. 9 a.)

"And it is to be understood, that in a lease for yeares, by deed or without deed, there needs no livery of seisin to be made to the lessee, but he may enter when he will by force of the same lease. But of feoffements made in the country, or gifts in taile, or lease for terme of life; in such cases where a freehold shall passe, if it be by deed or without deed, it behoveth to have livery of seisin." (Litt. Tens. L. 1, c. 1, s. 59.)

"*Livery of Seisin.* Traditio, or deliberatio seisinæ, is a solemnitie, that the law requireth for the passing of a freehold of lands or tenements by deliverie of seisin thereof.—Intervenire debet solemnitas in mutatione liberi tenementi, ne contingat donationem deficere pro defectu probationis. And there be two kinds of livery of seisin, viz. a liverie in deed, and a livery in law. A livery in deed is when the feoffor taketh the ring of the doore, or turfe or twigge of the land, and delivereth the same upon the land to the feoffee in name of seisin of the land, &c. per hostium, et per haspam et annulum vel per fustem vel baculum, &c.

"A. seised of an house in fee, and being in the house, saith to B. I demise to you this house for terme of my life: this is a good beginning to limit the state, but here wanteth livery. A livery of deed may be done two manner of wayes. By a solemne act and words; as by delivery of the ring or haspe of the doore, or by a branch or twigge of a tree, or by a turfe of the land, and with these or the like words, the feoffor and feoffee both holding the deed of feoffment, and the ring of the doore, haspe, branch, twigge, or turfe; and the feoffor saying, Here I deliver you seisin and possession of this house, in the name of all the lands and tenements contained in this deed, according to the forme and effect of this deed; or by words without any ceremony or act; as, the feoffor being at the house doore, or within the house, Here I deliver you seisin and possession of this house, in the name of seisin and possession of all the lands and tenements contained in this deed; et sic de similibus: or, Enter you into this house or land, and have and enjoy it according to the deed; or, Enter into the house or land, and God give you joy: or, I am content you shall enjoy this land according to the deed or the like. For if words may amount to a liverie within the view, much more it shall upon the land. But if a man deliver the deed of feoffment upon the land, this amounts to no livery of the land, for it hath another operation to take effect as a deed; but if he deliver the deed upon the land in

name of seisin of all the lands contained in the deed, this is a good livery; and so are other books intended that treat hereof, that the deed was delivered in name of seisin of that land. Hereby, it appeareth, that the delivery of anything upon the land in name of seisin of that land, though it be nothing concerning the land, as a ring of gold, is good, and so hath it beene resolved by all the judges and so of the like.

"A livery in law is, when the feoffor saith to the feoffee, being in view of the house or land (I give you yonder land to you and your heires, and goe enter into the same, and take possession thereof accordingly), and the feoffee doth accordingly in the life of the feoffor enter, this is a good feoffment, for signatio pro traditione habetur. And herewith agreeth Bracton: Item dici poterit et assignari quando res vendita vel donata sit in conspectu, quam venditor et donator dicit se tradere; and in another place he saith, in seisinâ per effectum et per aspectum. But if either feoffor or the feoffee die before entry the livery is voyd. And livery within the view is good where there is no deed of feoffment. And such a liverie is good albeit the land lie in another county." (Co. Litt. 48 a, b.)

"But if a man letteth lands or tenements by deed or without deed for terme of yeares, the remainder over to another for life, or in taile, or in fee; in this case it behooveth, that the lessor maketh livery of seisin to the lessee for yeares, otherwise nothing passeth to them in the remainder, although that the lessee enter into the tenements." (Litt. Tens. L. i. c. 7, s. 60.)

"Maketh livery of seisin. Note, there is a diversity between livery of seisin of land, and the delivery of a deed; for if a man deliver a deed without saying of anything, it is a good delivery, but to a livery of seisin of land words are necessary. . . . . When the kinsman of Elimelech gave unto Boas the parcell of land that was Elimelech's, he tooke off his shoe, and gave it unto Boas in the name of seisin of the land (after the manner in Israel) in the presence and with the testimony of many witnesses. Ruth, c. iv. v. 7, 8; Deut. c. xxv. v. 9, 10." (Co. Litt. 49 b.)

Next of Exchange:—

"And in some case a man shall have by the grant of another a fee simple, fee tail, or freehold without livery of seisin. As if there be two men, and each of them is seised of one quantitie of land in one countie, and the one granteth his land to the other in exchange for the land which the other hath, and in like maner the other granteth his land to the first grantor in exchange for the land which the first grantor hath; in this case each may enter into the other's land, so put in ex-

change, without any livery of seisin; and such exchange made by paroll of tenements within the same county without writing is good enough. And if the lands or tenements be in divers counties, viz., that which the one hath in one county, and that which the other hath in another county, there it behoveth to have a deed indented made betweene them of this exchange. And note, that in exchanges it behooveth, that the estates which both parties have in the lands so exchanged, be equall; for if the one willeth and grant that the other shall have his land in fee taile for the land which he hath of the grant of the other in fee simple, although that the other agree to this, yet this exchange is voyde, because the estates be not equall. In the same manner it is, where it is granted and agreed betweene them, that the one shall have in the one land fee taile, and the other in the other land but for terme of life; or if the one shall have in the one land fee taile generall, and the other in the other land fee taile especiall, &c. So alwaies it behoveth that in exchange the estates of both parties be equall, viz., if the one hath a fee simple in the one land, that the other shall have like estate in the other land; and if the one hath fee taile in the one land, the other ought to have the like estate in the other land, &c., and so of other estates. But it is nothing to charge of the equal value of the lands; for albeit that the land of the one be of a farre greater value than the land of the other, this is nothing to the purpose, so as the estates made by the exchange be equall. And so in an exchange there be two grants, for each party granteth his land to the other in exchange, &c., and in each of these grants mention shall be made of the exchange." (Litt. L. 1, c. 7, ss. 62, 63, 64, 65.)

"In exchanges it behooveth, that the estates be equal," &c. 'Equality in lands is threefold, viz.: First, equality in value; secondly, equality in quantity of estate given and taken; thirdly, equality in quantity or manner of the estate given and taken. But, as Littleton after saith, equality in value of lands in exchange is not requisite; neither equality in the quality or manner of the estate. . . . . To shut up this point, there be five things necessary to the perfection of an exchange. 1. That the estates given be equall. 2. That this word (excambium, exchange) be used, which is so individually requisite, as it cannot be supplied by any other word, or described by any circumlocution: and herewith agreeth Littleton afterwards in this section. In the booke of Domesday I finde, Hanc terram cambiavit Hugo Briccuino quod modò tenet comes Meriton, et ipsum scambium valet duplum. Hugo de Belcamp pro escambio de Warres. 3. That there be an execution by entry or claime

in the life of the parties, as hath bin said. 4. That if it be of things that lye in grant, it must be by deed. 5. If the lands be in severall counties, there ought to be a deed indented, or if the thing lye in grant, albeit they be in one county." (Co. Litt. 51a, 51b.)

Next of Partition:—

"*And* it is to be understood, that partition may be made in divers maners. One is, when they agree to make partition, and do make partition of the tenements; as if there be two parceners to divide between them the tenements in two parts, each part by it selfe in severalty and of equall value; and if there be three parceners, to divide the tenements in three parts by it selfe in severalty, &c.

"*Another* partition there is, viz. to choose, by agreement betweene themselves, certaine of their friends, to make partition of the lands or tenements aforesaid. And in these cases, after such partition, the eldest daughter shall choose first one of the parts so divided, which she will have for her part, and then the second daughter next after her another part, and then the third sister another part, then the fourth sister another part, &c. if so be that there be more sisters, &c. unlesse it be otherwise agreed between them. For it may be agreed between them, that one shall have such tenements, and another such tenements, &c. without any primer election. *And* the part which the eldest sister hath, is called in Latine *enitia pars*. But if the parceners agree that the eldest sister shall make partition of the tenements in manner aforesaid, and if she do this, then it is said, that the eldest sister shall choose last for her part, and after every one of her sisters, &c.

"*Another* partition or allotment is, as if there be four parceners, and after partition of the lands be made, every part of the land by itself is written in a little scrowle and is covered all in waxe in manner of a little ball, so as none may see the scrowle and then the 4 balls of waxe are put in a hat to be kept in the hands of an indifferent man, and then the eldest daughter shall first put her hand into the hat, and take a ball of waxe with the scrowle within the same ball for her part, and then the second sister shall put her hand into the hat and take another, the 3 sister the 3 ball, and the 4 sister the 4 ball, &c. and in this case every one of them ought to stand to their chance and allotment.

"*Also*, there is another partition. As if there be four parceners, and they will not agree to a partition to be made between them, then the one may have a writ of partitione faciendâ against the other three, or two of them may have a writ of partitione faciendâ against the other two, or three of them may have a writ of par-

titione faciendâ against the fourth, at their election. *And* when judgement shall be given upon this writ, the judgment shall be thus: that partition shall be made betweene the parties, and that the sherife in his proper person shall go to the lands and tenements, &c. and that he by the oath of 12 lawful men of his bailiwick, &c. shall make partition between the parties, and that one part of the lands and tenements shall be assigned to the plaintif or to one of the plaintifs, and another part to another parcener, &c. not making mention in the judgement of the eldest sister more than of the youngest.

"*And* of the partition which the sherife hath so made, he shall give notice to the justices under his seale, and the seales of every of the 12, &c. And so in this case you may see, that the eldest sister shall not have the first election, but the sherife shall assigne to her her part which she shall have, &c. And it may be that the sherife will assigne first one part to the youngest, &c. and last to the eldest, &c.

"*And* note, that partition by agreement between parceners may be made by law betweene them, as well by paroll without deed, as by deed." (Litt. L. 3, c. 1, ss. 243-250.)

"'And it is to be understood' . . . . (&c.) 'By this section, and the (&c.) in the end of it, it is to be understood, that there are two kinds of partitions betweene coparceners; the one in deed or expresse, and the other in law or implicite. Of partitions in deed or expresse, some be voluntary, whereof Littleton enumerates four manners; and one compulsory, that is, by writ of partition.

"'The first partition in deed betweene coparceners, is that which Littleton here speaketh of, viz. *When they agree and make partition* of the tenements, &c., each part by itselfe in severalty and of equall value, &c. If coparceners make partition, at full age and unmarried, and of sane memorie, of lands in fee simple, it is good and firme for ever, albeit the values be unequall; but if it be of lands entailed, or if any of the parceners be of *non sane memorie*, it shall binde the parties themselves, but not their issues unlesse it be equall; or if any be *covert*, it shall bind the husband, but not the wife or her heires, or if any be within age, it shall bind the infant; as shall be said more fully hereafter. The second partition followeth in the next section. And here the (&c.) implyeth further, that if there be four parceners, then four parts, if five, five parts, and so forth. It further implyeth, that all this must be in severalty; whereof, and with what limitations, this is to be understood, it hath been declared before.

"'But there be other partitions in deed than here have been

mentioned. For a partition made between two coparceners, that the one shall have and occupy the land from Easter untill the first of August only in severalty by himselfe, and that the other shall have and occupie the land from the first of August untill the feast of Easter yearely to them and their heires, this is a good partition. Also if two coparceners have two mannors by descent, and they make partition, that the one shall have the one manor for one yeare, and the other the other manor for this year, and so alternis vicibus to them and their heires, this is a good partition. The same law is, if the partition be made in forme aforesaid, for two or more yeares, and each coparcener have an estate of inheritance, and no chattell, albeit either of them alternis vicibus have the occupation but for a certain terme of yeares.

" 'Of partitions in law, some be by act in law without judgement, and some be by judgement and not in a writ de partitione faciendâ. And of these in order. . . . .

" 'If two coparceners be, and each of them taketh husband and have issue, the wives die, the coparcenary is divided, and here is a partition in law.

" 'If two coparceners be, and one disseise the other, and the disseisee bringeth an assise, and recover, it hath beene said, that she shall have judgement to hold her moiety in severalty. And this seemeth (say they) verie ancient, and thereupon vouch Bracton, Si res fuerit communis, locum habere poterit communi dividendo judicium. (Lib. 4, fo. 216 b.). And so (say they) if the one coparcener recover against another in a nuper obiit, or a rationabili parte, the judgement shall be, that the demandant shall recover and hold in severalty. But Britton is to the contrary; for he saith, Et si ascun des parceners soit enget ou disturbe de la seisin per ses auters parceners, un, ou plusors, al disseisee viendra assise per severall pleint sur les parceners et recovera, mes nemy a tener en severaltie, mes en common solonque ceo que avant le fist, &c. And this seemeth reasonable; for he must have this judgement according to his plaint, and that was of a moitie, and not of anything in severaltie, and the sherife cannot have any warrant to make any partition in severalty or by metes and bounds.'" (Co. Litt. 165 b, 166 a, 187 b.)

Next of Leases:—

" Tenant for terme of yeares is where a man letteth lands or tenements to another for terme of certaine yeares, after the number of yeares that is accorded between the lessor aud the lessee. And when the lessee entreth by force of the lease, then is he tenant for tearme of yeares; and if the lessor in such case

reserve to him a yearely rent upon such lease, he may chuse for to distraine for the rent in the tenements letten, or else he may have an action of debt for the arrerages against the lessee. But in such case it behooveth, that the lessor be seised in the same tenements at the time of his lease; for it is a good plee for the lessee to say, that the lessor had nothing in the tenements at the time of the lease, except the lease be made by deed indented, in which case such plee lieth not for the lessee to plead." (Litt. s. 58.)

"Where a man letteth (lou home lessa) lands, &c. 'Lessa and lease is derived of the Saxon word *leapum*, or *leasum*, for that the lessee commeth in by lawfull meanes; and dimittere is in French laysser, to depart with or forgoe.'

"A man letteth." 'Leases for lives or yeares are of three natures.' Some be good in law; some be voydable by entry, and some void without entry. Of such as be good in law, some be good at the common law as made by tenant in fee, whereof Littleton here putteth his case: some by act of parliament; as tenant in taile, a bishop seised in fee in the right of his church alone without his chapter, a man seised in fee simple or fee taile in the right of his wife together with his wife (as hath beene said) may by deed indented make leases for twenty-one yeares or three lives in such manner and forme as hath been said and by the statute is limited, all which were voydable by the common law when Littleton wrote, and now are made good by parliament. . . . . Some voide in præsenti; as if one make a lease for so many yeares as he shall live, this is voide in præsenti for the uncertainty. Et sic in similibus, whereof Littleton himselfe will teach you next and immediately, and I know you would now gladly hear him.

"For terme." . . . . "Words to make a lease be, demise, grant, to fearme let, betake; and whatsoever word amounteth to a grant may serve to make a lease." (Co. Litt. 43 b, 45 b.)

. . . . "And the lessor is properly where a man letteth to another lands or tenements for terme of life, or for terme of years, or to hold at will, he which maketh the lease is called lessor, and he to whom the lease is made is called lessee. And every one which hath an estate in any lands or tenements for term of his owne or another man's life is called tenant of freehold, and none other of a lesser estate can have a freehold." (Litt. s. 57.)

"Freehold." "Here it appeareth that tenant in fee, tenant in taile, and tenant for life are said to have a frank tenement, or freehold, so called because it doth distinguish it from termes of yeares, chattels upon uncertaine interests, lands in villenage, or customary or copyhold lands." (Co. Litt. 43 b.)

Next of Releases:—

"Releases are in divers manners, viz. releases of all the right which a man hath in lands or tenements, and releases of actions personalls and realls, and other things. Releases of all the right which men have in lands and tenements, &c. are commonly made in this forme or to this effect: Know all men by these presents, that I, A. of B. have remised, released, and altogether from me and my heires quiet claimed (me A. de B. remisisse, relaxasse, et omnino de me et hæredibus meis quietum clamâsse): or thus, for mee and my heires quiet claimed to C. of D. all the right, title, and claim (totum jus, titulum, et clameum) which I have, or by any meanes may have, of and in one messuage with the appurtenances in F. &c. And it is to be understood, that these words, remisisse, et quietum clamâsse, are of the same effect as these words, relaxasse." (Litt. ss. 444, 445.)

"And it is to be understood, that a release may enure four manner of wayes. First, by way of mitter l'estate" . . . . (as if a joynt estate be made to the husband and wife, and to a third person, and the third person release all his rights which he hath to the husband, then hath the husband the moitie which the third had, and the wife hath nothing of this. (L. 3, c. 4. s. 305).) "Secondly, by way of mitter le droit." . . (. . As if a man seised of certaine tenements is disseised by two disseisors, if the disseisee by his deed release all his right, &c. to one of the disseisors, then he to whom the release is made, shall have and hold all the tenements to him alone, and shall oust his companion of every occupation of this. (L. 3, c. 4, s. 306).) "Thirdly, by way of extinguishment." . . (. . As if a man be disseised, and the disseisor makes a feoffment to two men in fee, if the disseisee release by his deed to one of the feoffees, this release shall enure to both the feoffees, for that the feoffees have an estate by the law, scilicet, by feoffment, and not by wrong done to any, &c. (L. 3, c. 4, s. 307).) "Fourthly, by way of creation or inlargement of an estate." . . (. . For if I let land to a man for terme of his life, and after I release to him all my right without more saying in the release, his estate is not enlarged. But if I release to him and to his heires then he hath a fee simple; and if I release to him and to his heires of his bodie begotten, then hee hath a fee taile, &c. And so it behoveth to specifie in the deed what estate hee to whom the release is made shall have." (Litt. s. 465. Co. Litt. 193 b, 273 b.))

Next of Surrender:—

"Also, if a woman inheritrix taketh husband, and they have issue a son, and the husband dieth, and she takes another

husband, and the second husband letteth the land which he hath in right of his wife to another for terme of his life, and after the wife dieth, and after the tenant for life surrendereth his estate to the second husband, &c. quære, if the sonne of the wife may enter in this case upon the second husband during the life of tenant for life, &c. But it is cleere law, that after the death of the tenant for life, the son of the wife may enter; because the discontinuance, which was only for terme of life, is determined, &c. by the death of the same tenant for life." (Litt. s. 636.)

" Surrender, 'sursum redditio, properly is a yeelding up an estate for life or yeares to him that hath an immediate estate in reversion or remainder, wherein the estate for life or yeares may drowne by mutuall agreement betweene them.'

" Note, there be three kinde of surrenders, viz. a surrender properly taken at the common law, which is here before described, and whereof Littleton speaketh. Secondly, a surrender by custome of lands holden by copy, or of customary estates, whereof you have read before, sect. 74, and a surrender improperly taken (as appears before, sect. 550), of a deed. And so of a surrender of a patent, and of a rent newly created, and of a fee simple to the king.

" A surrender properly taken is of two sorts, viz. a surrender in deed, or by expresse words (whereof Littleton here putteth an example), and a surrender in law wrought by consequent by operation of law. . . . .

" Also there is a surrender without deed, whereof Littleton putteth here an example of an estate for life of lands, which may be surrendered without deed, and without livery of seisin; because it is but a yeelding, or a restoring of, the state againe to him in the immediate reversion or remainder; which are alwayes favoured in law. And there is also a surrender by deed; and that is of things that lie in grant, whereof a particular estate cannot commence without deed, and by consequent the estate cannot be surrendered without deed." (Co. Litt. 337 b, 338 a.)

Next of Confirmation:—

" A *deede* of confirmation is commonly in this forme, or to this effect: Know all men, &c., that I, A. of B. have ratified, approved, and confirmed to C. of D. the estate and possession which I have, of, aud iu oue messuage, &c. with the appurtenauces in F., &c. (Novernt universi, &c. me A. de B. ratificasse, approbâsse, et confirmâsse C. de D. statum & possessionem, quos habeo, de, & in uno messuagio, &c. cum pertinentibus in F., &c.)." (Litt. s. 515.)

" Here first our author shewes what a confirmation is:"

" Confirmation. ' Confirmatio commeth of the verbe confirmare, quod est firmum facere: and therefore it is said, that confirmatio omnes supplet defectus, licèt id quod actum est ab initio, non valuit.' A confirmation is a conveyance of an estate or right in esse, whereby a voidable estate is made sure and unavoidable, or whereby a particular estate is encreased.

" A confirmation doth not strengthen a voide estate." (Co. Litt. 295 b.)

" *And* in some case a deede of confirmation is good and available, where in the same case a deede of release is not good nor availeable. . . . ." (Litt. s. 516.)

" ' Littleton, in this chapter, putteth eight diversities betweene a confirmation and a release.' 296 a. [1. Confirmation by reversioner of lease for years made by his freeholder for life—good—release—void. Ss. 516, 517. 2. Confirmation by disseisee of disseisor's termor for years—good—release—void. S. 518. 3. Confirmation by disseisee of disseisor's tenant for life void as to remainder over in fee; release—good as to both estates. S. 521. 4. Confirmation to one of two joint disseisors avails to both—release—avails to one only. 5. Confirmation by disseisee of rent charge granted by devisee rehearsing the grant, query, if land be discharged of rent or no; but release to grantee clearly void. S. 527. 6. Confirmation of a seigniory, rent charge, or common void; release thereof good. Ss. 535, 536, 537. 7. Confirmation to one's own tenant for years without more words void; release to the same confers freehold. Ss. 545, 546. 8. Confirmation by minor on his majority of underlease made by his termor to whom he let whilst an infant—good; release—void—but release available if lessee has assigned his whole estate. S. 547.]

" And it is to be understood, that when it is said, that males or females be of full age, this shall be intended of the age of 21 yeares; for if before such age any deed, or feoffment, grant, ... be made by any of them, &c. . . . . all serve for nothing and may be avoided." (Litt. s. 259.)

" Also, in releases of all the right which a man hath in certaine lands, &c. it behoveth him to whom the release is made in any case, that he hath the freehold in the lands in deed, or in law, at the time of the release made, &c." (Litt. s. 447.)

" Grant, concessio, is in the common law a conveyance of a thing that lies in grant and not in livery, which cannot passe without deed; as advowsons, services, rents, commons, reversions, and such like." (Co. Litt. 172 a.)

" Of all the right." ' And it is to be observed, that by the

ancient maxime of the common law, a right of entrie, or a chose in action, cannot be granted or transferred to a stranger, and thereby is avoyded great oppression, injurie and injustice. Nul charter, nul vende, ne nul done vault perpetualment si le donor n'est seisie al temps de contracts de 2 droits, si del droit de possession, et del droit del propertie.'" (Mirror, cap. 2.) (Co. Litt. 266 a.)

Next of Assignment:—

"An assignment of land or real estate is properly a transfer, or making over to another, of a person's whole interest therein, whatever interest that may be; but it is more particularly applied to express the transfer of an estate for life or years. And an assignment for life or years differs from a lease only in this, that by a lease a man grants a lease less than his own, reserving to himself a reversion; by an assignment he parts with the whole property, and the assignee consequently stands in the place of the assignor. Thus where a lease is assigned, the assignee becomes liable, to the landlord or reversioner, for the future performance of the covenants made by the lessee: and he remains so until the assignee assigns over in his turn to another person. And this liability attaches to him even without entry. Yet he is not liable by force of the assignment, except on such covenants as *run with the land*. . . . And on the other hand, he is entitled, during the same period, to enforce against the reversioner any covenants running with the land, which the lease contains in favour of the lessee; and in case the reversioner conveys his interest to another, then to enforce them also for the future against the grantee of the reversion. It is to be observed, however, that if the transfer of the term be for a single day short of the residue of the term, no liability or claim on the original covenants can arise between these parties. . . No deed or other writing was necessary at common law, to the validity of an assignment." (Stephen's Commentaries, vol. i.)

Next of Disseisin, Abatement, Intrusion, Deforciament, Usurpation and Purpresture:—

"Also, if a man be disseised, who hath a sonne within age and dieth, and the sonne being within age the disseisor dieth seised, and the land descend to his heire, and a stranger abate, and after the sonne of the disseisee, when he commeth to his full age, releaseth all his right to the abator; in this case the heire of the disseisor shall not have an assise of mor-d'ancester against the abator; but shall be barred, because the abator hath the right of the sonne of the disseisee by his release, and the entry of the sonne was congeable, for that he was within age at the time of the discent," &c. (Litt. s. 475.)

" Abate." . . . 'A disseisin is a wrongfull putting out of him that is actually seised of a freehold. And abatement is when a man died seised of an estate of an inheritance, and betweene the death and the entry of the heire, an estranger doth interpose himselfe, and abate.'

"Intrusion first properly is, when the ancestor died seised of any estate of inheritance expectant upon an estate for life, and then tenant for life dieth, and between the death and the entry of the heire an estranger doth interpose himselfe and intrude.

"Secondly, he that entereth upon any of the king's demesnes, and taketh the profits, is said to intrude upon the king's possession.

"Thirdly, when the heire in ward entreth at his full age without satisfaction for his mariage, the writ saith, quod intrusit.

"*Deforciamentum* comprehendeth not only these aforenamed, but any man that holdeth land whereunto another man hath right, be it by discent or purchase, is said to be a deforceor.

"Usurpation hath two significations in the common law: one, when an estranger that no right hath presenteth to a church, and his clerke is admitted and instituted, hee is said to bee an usurper, and the wrongfull act that he hath done is called an usurpation.

"Secondly, when any subject doth use, without lawfull warrant, royal franchises, he is said to usurpe upon the king those franchises.

"*Purprestura*, or *pourprestura*, a purpresture. Purprestura est, &c. generaliter quoties aliquid fit ad nocumentum regii tenementi, vel regiæ viæ (vel aliquarum publicarum) vel civitatis, &c. (Glanv. L. 9, c. 11.) And because it is properly when there is a house builded, or an enclosure made of any part of the king's demesnes, or of an highway, or a common street or publike water, or such like publike things, it is derived of the French word *pourpris*, which signifieth an enclosure, but specially applied, as is aforesaid, by the common law." (Co. Litt. 277 a, b.)

Next of Discontinuance:—

"*Discontinuance* is an ancient word in the law, and hath divers significations, &c. But as to one intent it hath this signification, viz., where a man hath aliened to another certaine lands or tenements and dieth, and another hath right to have the same lands or tenements, but hee may not enter into them because of such an alienation, &c." (Litt. s. 592.)

"*Discontinuance.*" . . . . 'A discontinuance of estates in lands or tenements is properly (in legall understanding) an alienation made or suffered by tenant in taile, or by any that is

seised in auter droit, whereby the issue in taile; or the heire or successor, or those in reversion or remainder, are driven to their action and cannot enter.'

" Significations. Here (as in many other places) it appeareth how necessary it is to know the signification of words. And in this chapter it appeareth, that when Littleton wrote, the estate in lands and tenements might have beene discontinued five manner of wayes, viz., by feoffment, by fine, by release, with warrantie, confirmation with warrantie, and by suffering of a recovery in a præcipe quod reddat. And this was to the prejudice of five kinds of persons, viz., of wives, of heires, of successors, of those in reversion, and of those in remainder. But for wives, and their heires, and for successors, the law is altered by acts of parliament since Littleton wrote, as in this chapter in their proper places shall appeare." (Co. Litt. 325 a, b.)

Next of Disclaimer:—

"*And* it is said, that if such tenant (holding by homage auncestrel) be impleaded by a præcipe quod reddat, &c. and vouch to warrantie his lord, who commeth in by process, and demands of the tenant what he hath to binde him to warranty, and he sheweth, how he and his ancestors, whose heire he is, have holden their land of the vouchee and of his ancestors time out of minde of man; and if the lord which is vouched, hath not received homage of the tenant nor of any of his ancestors, the lord (if he will) may disclaime in the seigniory, and so ouste the tenant of his warranty." (Litt. s. 145.)

" The lord (if he will) may disclaime in the seigniory. Disclaime, disclamare, is compounded of de and clamo, and signifieth utterly to renounce the seigniorie.

" Note, there be divers kinds of disclaymer, that is to say, a disclaimer in the tenancie; a disclaymer in the bloud; and a disclaymer in the seigniorie; whereof Littleton here putteth his case." (Co. Litt. 102 a.)

Next of Defeazance:—

"*And* many other things there are of estates upon condition in law, and in such cases he needed not to have shewed any deed, rehearsing the condition, for that the law it selfe purporteth the condition, &c.

" Ex paucis dictis intendere plurima possis."

" More shall be said of conditions in the next chapter, in the chapter of Releases, and in the chapter of Discontinuance." (Litt. s. 384.)

" Littleton having spoken at large of conditions in deed and in law, somewhat seemeth necessary to bee said of defeasances,

whereby the state or right of freehold and inheritance may be defeated and avoyded.

" ' Defeasance,' deifeisantia, is fetched from the French word defaire, *i. e.* to defeat or undoe, infectum reddere quod factum est. There is a diversitie between inheritances executed, and inheritances executorie; as lands executed by livery, &c. cannot by indenture of defeasance be defeated afterwards. And so if a disseisee release a disseisor, it cannot bee defeated by indentures of defeasance made afterwards; but at the time of the release or feoffment, &c. the same may be defeated by indentures of defeasance, for it is a maxime in law, Quæ incontinenti fiunt in esse videntur.

" But rents, annuities, conditions, warranties, and such like, that be inheritances executorie, may be defeated by defeasances made, either at that time, or any time after: and so the law of statutes, recognizances, obligations, and other things executorie.

" Ex paucis dictis intendere plurima possis."

" Verses at the first were invented for the helpe of memorie, and it standeth well with the gravitie of our lawyer to cite them. By this verse of our author, inferences and conclusions in like cases are warrantable." (Co. Litt. 236 b, 237 a.)

Now of the foregoing modes of transfer which were not required to be by deed, most were required by the Statute of Frauds to be evidenced by writing—an exception to which was the creation by lease of a term not exceeding three years from the making thereof, whereon two-thirds of the full improved annual value was reserved as rent, and now by sect. 3, 8 & 9 Vict. c. 106, it is enacted—" That a feoffment, made after the first day of October, 1845, other than a feoffment made under a custom by an infant, shall be void at law, unless evidenced by deed; and that a partition, and an exchange, of any tenements or hereditaments, not being copyhold, and a lease, required by law to be in writing, of any tenements or hereditaments, and an assignment of a chattel interest, not being copyhold, in any tenements or hereditaments, and a surrender in writing of an interest in any tenements or hereditaments, not being a copyhold interest, and not being an interest which might by law have been created without writing, made after the said first day of October, 1845, shall also be void at law, unless made by deed: Provided always, that the said enactment so far as the same relates to a release or a surrender shall not extend to Ireland."

Next of extraordinary Assurances which were by Fine or Recovery:—

" Fines were so called, because they put an end, not only to

the suit then commenced, but also to all other suits and controversies concerning the same matter. They are assurances of equal antiquity with the first rudiments of the law itself; are spoken of by Glanvil and Bracton, in the reigns of Henry the second and Henry the third, as things then well known and long established; and instances are produced of them even prior to the Norman invasion. So that the statute 18 Edw. 1, called modus levandi fines, did not give them original, but only declared and regulated the manner in which they should be levied or carried on. And that was as follows:—

"1. The party to whom the land was to be conveyed, or assured, commenced an action or suit at law against the intended vendor (generally an action of covenant), by suing out a writ denominated, from its initial words, a writ of præcipe quod teneat conventionem; the foundation of which was a supposed agreement or covenant that the defendant should convey the lands to the plaintiff: on the breach of which agreement the action was brought. . . . Then followed, 2. The licentia concordandi, or leave to agree the suit. For as soon as the action was brought, the defendant, knowing himself to be in the wrong, was supposed to make overtures of peace and accommodation to the plaintiff, by whom they were accordingly accepted; but having, upon suing out the writ, given pledges to prosecute his suit, which he endangered, if he now deserted it without licence, he therefore applied to the court for leave to make the matter up. This leave was readily granted. . . . 3. Next came the *concord*, or agreement itself, after leave obtained from the court; and this was usually an acknowledgment from the deforciants (or those who kept the other out of possession) that the lands in question were the right of the complainant. And from this acknowledgment or recognition of right, the party levying the fine was called the cognizor, and he to whom it was levied the cognizee. The acknowledgment was to be made either openly in the Court of Common Pleas, or else before one of the judges of that court, or before two or more commissioners (in the county) empowered by a special authority, called a writ of dedimus potestatem, and these judges and commissioners were bound, by statute 18 Edw. 1, st. 4, to take care that the cognizors were of full age, sound memory, and out of prison. And if there were any feme covert among the cognizors, she was privately examined, whether she did it willingly and freely, or by compulsion of her husband. By these acts, all the essential parts of a fine were completed; and if the cognizor died the next moment after the fine was acknowledged, provided it were subsequent to the day on which the writ was

made returnable, still the fine was to be carried on in all its remaining parts. Of these the next was, 4. The *note* of the fine, which was only an abstract of the writ of covenant, and of the concord; naming the parties, the parcels of land, and the agreement: and this was to be enrolled of record in the proper office, by direction of the statute 5 Hen. 4, c. 14. 5. The fifth and last part was the *foot* of the fine, or conclusion of it: which included the whole matter, and recited the parties, and the day, year and place when, where and before whom it was acknowledged or levied. Of this conclusion, there were indentures made and engrossed at the chirographer's office, and delivered to the cognizor and the cognizee; usually beginning thus: '*Hæc est finalis concordia,* this is the final agreement,' and then reciting the whole proceedings at length. And thus the fine was completely levied at common law.

"To render the fine more universally public, and less liable to be levied by fraud or covin, it was directed by 4 Hen. 7, c. 24 (in confirmation of a previous statute), that a fine, after engrossing, should be openly and solemnly read and proclaimed in court (during which all pleas should cease) sixteen times; viz., four times in the term in which it was made, and four times in each of the three succeeding terms; and these proclamations were indorsed on the back of the record.

"Fines thus levied were of four kinds:—1. What in our law French was called a fine sur cognizance de droit come ceo que il ad de son don; that is, a fine upon acknowledgment of the right of the cognizee, as that which he hath of the cognizor. . . . 2. A fine sur cognizance de droit tantum, or upon acknowledgment of the right merely, not with the circumstance of a preceding gift from the cognizor. . . . 3. A fine sur concessit was where the cognizor, in order to make an end of disputes, though he acknowledged no precedent right, yet granted to the cognizee an estate *de novo,* usually for life or years, by way of supposed composition. . . . 4. A fine sur don, grant et render was a double fine, comprehending the fine sur cognizance de droit come ceo, &c., and the fine sur concessit, and might be used to create particular limitations of estate, whereas the fine sur cognizance de droit come ceo, &c. conveyed nothing but an absolute estate. . . .

"We are next to consider the force and effects of a fine, and these were principally as follows.

1. Like all other conveyances, it bound the parties thereto, and also all 'privies,' that is, persons deriving title under the parties; and this whether levied with proclamations or not. . . .

2. A fine with *proclamations* bound not only parties and privies but even strangers (that is, persons not parties or privies), if they failed to put in their claims within the time allowed by law; and if during all that period they were subject to no legal disability sufficient to excuse their acquiescence. . . .
3. A fine levied by tenant in tail with proclamations barred the issue in tail. It had indeed been expressly provided by the statute *De donis*, that a fine should have no such effect; but by 32 Hen. 8, c. 36, it was at length enacted, that when levied with proclamations according to 4 Hen. 7, c. 24, by any person of full age, it should be a sufficient bar and discharge for ever against the tenant and his heirs, claiming only by force of the entail. . . .
4. If a tenant in tail of a corporeal hereditament in possession levied a fine 'sur cognizance come ceo, &c.,' with or without proclamations, it was a discontinuance of the entail; the effect of which was, that the issue in tail, and those in remainder, or reversion, lost that right of entry, which, upon the death of the tenant in tail, would otherwise have accrued to them respectively; but those in remainder or reversion had nevertheless a remedy in a particular form of action called a *formedon;* and so had the issue in tail, unless the fine was levied with proclamations. . . . .
5. A fine 'sur cognizance come ceo, &c.,' levied by a tenant for life in possession, worked a forfeiture, if for a greater estate than the law entitled him to make; and consequently destroyed the contingent remainders (if any) expectant on his life interest. The same result as regards forfeiture also followed, where such fine was levied by a tenant for a term of years.

"A recovery—or a *common* recovery as it was also called, to distinguish it from a real adjudication in an action—differed from a fine, in this general point of view, that it supposed a suit not immediately compromised, but carried on through every regular stage of proceeding. Its nature and progress were as follows.

"Let us in the first place suppose Daniel Edwards to have been tenant of the freehold, for example, tenant in tail in possession; and desirous to suffer a common recovery, in order to bar all entails, remainders and reversions, and to convey the same in fee simple to Francis Golding. To effect this, Golding was to bring an action against him for the lands; and he accordingly sued out a writ called a præcipe quod reddat. In this

writ, the demandant Golding alleged that the defendant Edwards (here called the tenant) had no legal title to the land, but that he came into possession of it after one Hugh Hunt had turned the demandant out of it. The subsequent proceedings were made up into a record or recovery roll, in which the writ and complaint of the demandant were first recited; whereupon the tenant appeared and called upon Jacob Morland, who was supposed, at the original purchase, to have warranted the title to the tenant. And thereupon he prayed that the said Jacob Morland might be called in to defend the title which he so warranted. This was called the *voucher* (vocatio, or calling of Jacob Morland) *to warranty*, and Morland was called *the vouchee*. Upon this, Jacob Morland, the vouchee, appeared, was impleaded, and defended the title. Whereupon Golding, the demandant, desired leave of the court to *imparl*, or confer with the vouchee in private, which was usually allowed him as a matter of course. And soon afterwards the demandant Golding returned to court, but Morland, the vouchee, disappeared or made default. Whereupon judgment was given for the demandant Golding (thenceforth called the *recoveror*) to recover the land in question against the tenant Edwards, who was then the *recoveree*, and Edwards had judgment to recover of Jacob Morland land of equal value, in recompense for the land so warranted by him and lost by his default; which was agreeable to the doctrine we have before mentioned. This was called the recompense, or *recovery in value*. But Jacob Morland having no lands of his own, being usually the crier of the court (who from being thus frequently vouched was called the *common vouchee*), it was plain that Edwards had only a nominal recompense for the land so recovered against him by Golding, which lands were then absolutely vested in the said recoveror by judgment of law, and seisin thereof was delivered to him by the sheriff of the county. So that this collusive recovery operated merely in the nature of a conveyance in fee simple from Edwards, the tenant in tail, to Golding, the purchaser.

"The recovery above described was with a single voucher only, but sometimes it was with double, treble or further voucher, as the exigency of the case might require. And indeed, in modern times, it was usual always to have a recovery with double voucher at the least, by first conveying, where the person whose estate tail was intended to be barred was *immediate* tenant in tail, an estate of freehold to any indifferent person against whom the *præcipe* was brought (which was called making a tenant to the *præcipe*); and then the tenant to the *præcipe* vouched the tenant in tail, who vouched over the common vouchee. For if

a recovery was had immediately against a tenant in tail, it barred only such estate in the premises of which he was then actually seised; whereas, if the recovery were had against another person, and the tenant in tail were vouchee, it barred every latent right and interest which he might have in the lands recovered. But where there was already a tenant for life in possession, with remainder over in tail, no other tenant to the præcipe (of course) was required to be made, in order to effect a voucher of the tenant in tail. If Edwards, therefore, were tenant of the freehold in possession, and John Barker were tenant in tail in remainder; here Edwards first vouched Barker, and then Barker vouched Jacob Morland, the common vouchee, who was always the last person vouched, and always made default: whereby the demandant Golding recovered the land against the tenant Edwards, and Edwards recovered a recompense of equal value against Barker, the first vouchee, who recovered the like against Morland, the common vouchee, against whom such ideal recovery in value was always ultimately awarded. . . . .

"As to the force and effect of recoveries, supposing them to be suffered in due form, they operated,

"1. To pass to the recoveror an estate in fee simple absolute; and thereby not only the estate tail itself, but all remainders and reversions expectant thereon, and all executory limitations and conditions whatever, to which it had been subject. . . . .

"2. A recovery, like a fine, would bind a married woman when she became a party to it with her husband's concurrence, and, as in the case of a fine, she was privately examined by the court in such cases, to ascertain that she acted without compulsion.

"3. And lastly, if a recovery was suffered by a tenant for life, it would work a forfeiture of the particular estate, and by consequence destroy all contingent remainders expectant thereon.

"It was, however, expressly provided by 14 Eliz. c. 8, that a recovery so suffered, without consent of the persons in reversion or vested remainder, should as against such persons be utterly void." (Stephen's Commentaries, vol. i. pp. 576—591 (6th ed.))

But now, by the 3 & 4 Will. 4, c. 74, fines and recoveries are abolished and all estates tail save those—1, after possibility of issue extinct; 2, those restrained by 34 & 35 Hen. 8, c. 20, or other statute, may be barred by deed inrolled in the High Court of Chancery within six calendar months after the execution—such disentailing assurance creating a fee simple abso-

lute where the protector of the settlement gives his consent—a base fee simple where that consent is withheld.

By the same statute married women are enabled to dispose of lands of any tenure by deed in which husband concurs, duly acknowledged after separate examination before one of the judges at Westminster, one of the commissioners for taking acknowledgments under the act, or before a county court judge.

Next of Conveyance of Copyholds:—

"*And* such a tenant may not alien his land by deed, for then the lord may enter as into a thing forfeited unto him. But if he will alien his land to another, it behoveth him after the custome to surrender the tenements in court, &c. into the hands of the lord, to the use of him that shall have the estate, in this forme, or to this effect.

"A. of B. commeth into this court, and surrendreth in the same court a mease, &c. into the hands of the lord, to the use of C. of D. and his heires, or the heires issuing of his body, or for terme of life, &c. And upon that commeth the aforesaid C. of D. and taketh of the lord in the same court the aforesaid mease, &c. To have and to hold to him and his heires, or to him and to his heires issuing of his body, or to him for terme of life, at the lord's will, after the custome of the manor, to do and yeeld therefore the rents, services and customes thereof before due and accustomed, &c. and giveth the lord for a fine, &c. and maketh unto the lord his fealty," &c. (Litt. s. 74.)

"'In court.' This is the generall custome of the realme, that every copiholder may surrender in court, and need not alleage any custome therefore. . . .

"Bracton, lib. 4, fol. 209, speaking of these kind of customary tenants, saith, Dare autem non possunt tenementa sua, nec ex causa donationis ad alios transferre non magis quam villani puri; et unde si transferre debeant, restituant ea domino vel ballivo, et ipsi ea tradant aliis in villenagium tenenda.

"'A. B. commeth into this court, and surrendreth, &c.' Here Littleton putteth an example of a surrender in court, and in this example three things are to be observed:—

First, that the surrender to the lord be generall without expressing of any estate, for that he is but an instrument to admit cesty a que use, for no more passeth to the lord, but to serve the limitation of the use; and Ce' que use, when he is admitted, shall be in by him that made the surrender, and not by the lord.

Secondly, if the limitation of the use be generall, then Ce'

que use taketh but an estate for life, and therefore here Littleton expresseth upon the declaration of the use, the limitation of the estate, viz. in fee simple, fee taile, &c.

Thirdly, the lord cannot grant a larger estate than is expressed in the limitation of the use." (Co. Litt. 59 b.)

An estate tail in copyholds was formerly barrable by surrender, customary recovery,—or otherwise according to the custom of the manor. But now by the Fines and Recoveries Act all legal entails are barrable by surrender and so are equitable entails, which, however, may also be barred by deed entered on the court rolls and not inrolled in chancery.

Next of Conveyance under the Statute of Uses:—

By sect. 1, 27 Hen. 8, c. 10, it is enacted:—"That where any person or persons stand or be seized, or at any time hereafter shall happen to be seized, of and in any honours . . . lands, tenements, remainders or other hereditaments to the use, confidence, or trust of any other person or persons, or of any body politick, by reason of any bargain, sale, feoffment, fine, recovery, covenant, contract, agreement, will, or otherwise, by any manner means whatsoever it be; that in every such case all and every such person and persons, and bodies politick that have any such use, confidence, or trust in fee-simple . . . or for years or otherwise, or any use, confidence, or trust in remainder or reverter shall from thenceforth stand and be seized, deemed and adjudged in lawful seisin, estate and possession of and in the same honours . . . and hereditaments, with their appurtenances . . . of and in such like estates as they had or shall have in use, trust or confidence of or in the same" . . . . the effect of which is to give the seisin to the person in whose favour the first use is declared or implied (e. g. bargain and sale) in all cases, except where the uses are—1. Of copyholds. 2. Of leaseholds. 3. Active, in other words,—uses for the execution of which the person in whom the common law seisin is vested has some office to perform, e. g. to pay over rents. I shall not trouble you with commenting on the mode by which through these exceptions and that of the construction, that no use upon a use was executed by the statute, equitable estates under the name of trusts were again revived. Nor is it requisite to mention how by this enactment modifications of estates previously unknown were introduced in springing and shifting uses, except to observe that the common law so far controls these dispositions as—1° That fractions of estates cannot be created thereunder—as limitation to A. and his heirs to the use of B. every Monday, Tuesday, and Wednesday, and to the use of C. every Thursday, Friday, Saturday,

and Sunday. 2° That, where the seisin to serve and the uses declared are co-extensive and in the same person, that person does not take under the statute but is *in* by the common law. 3° That in such last-mentioned case no modification of estates prohibited by the common law is in general allowable, though, in the particular case of a power of appointment, given to the person in whom the feeding seisin is vested, with a limitation of the uses in fee, until and in default of appointment, to such person, there is a departure from principle—it being now held that the uses until appointment are executed in the donee sub modo, so as to let in the power if duly exercised. Sir Edward Cleere's case, upon which this doctrine is based, is rather irrelevant, inasmuch as there the feoffee to uses and cestuy que use were different persons.

The statute operates either by—I. Transmutation of possession—where the seisin to serve uses is divested from the original owner—as where A. limits an estate to B. and his heirs—to the use of C. and his heirs—or, without declaring for whose benefit, the use results to himself. II. Without transmutation of possession—where the seisin to serve uses remains in the original owner, which is only possible where there is (a) good consideration—i. e. of blood—as in a covenant to stand seised—(b) valuable consideration—i. e. money or money's worth—as in a bargain and sale. Thus in the foregoing cases the statute vests the seisin in C., in the original owner (A.), in the covenantee, and in the bargainee respectively. It is worthy of notice that the fee passes to the bargainee on a bargain and sale, if no estate be limited—though in a covenant to stand seised, as in a conveyance operating by transmutation of possession, no greater interest passes to the covenantee or grantee than is expressly limited—the residue of the use resulting to the covenantor or grantor.

I might here introduce the ordinary method of conveyance at the present day—a deed of grant—which is framed by the joint aid of the common law and the Statute of Uses, but it will be more convenient to give you a coup d'œil of the remaining methods of transfer, reserving that to the last. I proceed therefore to *conveyance through the Court of Chancery.*

As to form, the mode of transfer is that in ordinary use, but there are several doctrines and practices in equity, which justify a separate consideration of this subject. First, as to specific performance and conversion. From the moment there is an agreement for a sale of lands, the subject of sale and price pass; in other words the parties instantly become reciprocal trustees—the vendor, of the hereditament—the vendee, of the purchase-

money, so that, strictly speaking, once the bargain is struck, the transaction ceases to be a contract—the equitable property in the thing sold and in the price being so absolutely conveyed that the commodum and damnum of merx and pretium now absolutely attach to vendee and vendor respectively, subject, however, to the latter's lien for the purchase-money. Thus, if the subject of sale—as a contingent or reversionary interest—should happen to be destroyed before the completion of the legal transfer, the purchase-money will nevertheless be due; and, on the other hand, if the property should rise enormously in value—as by the building of an Alexandra Palace or other speculation—still the vendor must execute a legal transfer on payment of the sum originally agreed upon. So the vendor must account for all the rents and profits and the vendee for the interest of the purchase-money. Equity again does not in general consider time to be of the essence of the contract; and thus a party may obtain a specific performance in the Court of Chancery, when by his own laches he would be debarred from recovering damages for breach of agreement in a court of law.

As to sales by auction—if the conditions state the sale to be unreserved the employment of a puffer vitiates the transaction; but until a recent act of parliament the employment of a puffer was allowable where nothing was said about the sale being unreserved. Another peculiarity as to sales by auction was what is called "Opening the biddings"—i. e. if before a certain stage of the proceedings was reached an advance (generally of ten per cent. of the purchase-money) was offered by a new bidder, the property would be again put up to auction; but this rule is now abolished (30 & 31 Vict. c. 48).

Next as to *conveyance by judgment or decree with execution*—this calls for no comment. (I told you in one of my first letters that ejectment—as constituted under the Common Law Procedure Act, 1852—supersedes all real actions except, 1. Dower unde nihil habet; 2. Writ of right of dower; 3. Quare impedit.) *Of Conveyances under general Acts of Parliament*—the Lands Clauses Consolidation Act—the Leases and Sales of Settled Estates Act and the Bankruptcy Act—furnish instances. *Conveyances by special Act of Parliament* and by royal charter and letters patent—of these it is sufficient to observe that the former are "privilegia," as the settlement of Blenheim House on the Marlboroughs in the reign of Anne,* and are now of very rare occurrence, the latter—as to the crown lands—are now restrained by several acts of parliament, but the sovereign

*. 5 & 6 Anne, c. 3.

is not prevented from disposing of lands purchased from the royal income.*

Next as to conveyances through the Landed Estates Court, Ireland:—

"All proceedings are commenced by petition, of which there are the following classes:—

I. For sale of incumbered estates.
II. For sale of unincumbered estates.
III. For sale of settled estates.
IV. For partition and sale.
V. For partition by consent of all the parties entitled to the undivided shares.
VI. For exchange.
VII. For statutable conveyance or specific performance.
VIII. For declaration of title.
IX. To sanction building leases.
X. For appointment of new trustees.
XI. For apportionment of landlord's rent." (Landed Estates Court Act, by Dodson Madden, Esq., Barrister-at-Law.)

The petition sets forth; that the petitioner is owner or incumbrancer of the lands described in the annexed schedules: that the premises are not subject to any leases, tenancies, rents, easements, or incumbrances, except those mentioned in the schedule: that no person interested in the said hereditaments is an infant, idiot, lunatic, or married woman, save and except—naming the various parties, if any: that there is not any suit or matter depending in any court of equity in relation to the premises or any part thereof, or in relation to the receipt of the rents and profits thereof—and concludes with the prayer that the premises or such part as the court shall direct may be sold, statutably conveyed, partitioned, exchanged, &c., according to the nature of the petition, and that the petitioner may have such further relief as to the court shall seem meet.

Then follow the schedules and the petition is verified by affidavit of the petitioner.

The petition is deposited with the clerk of the records, who transmits the "court copy" to the examiner of the judge. There are then three principal steps. 1. The conditional order for sale, declaration of title, &c. 2. The absolute order. 3. The conveyance. Before the conditional order there must be a full abstract of title lodged, and due publication by advertisement of the application. On the conditional order being made and no person appearing to show cause or being unsuc-

* 25 & 26 Vict. c. 37.

cessful in showing cause against it, the party having carriage of the proceedings attends at the registrar's office to prove the services of the conditional order and that no cause has been shown or that the cause has been disallowed, and thereupon the registrar makes out the absolute order and transmits to the judge's examiner a certificate that such order has been made absolute and issued from his office. The order being thus made absolute, the petition, supposing it be for a sale, is registered now, if not previously, as a lis pendens. Deeds, muniments of title, and papers relating to the title of the land are brought in and lodged on oath with the keeper of the deeds, or produced to the examiner. The examiner settles the general notice to claimants from a draft furnished by the solicitor having carriage of the proceedings—such notice being published in at least one Dublin and one local newspaper, and in such other newspapers as may be directed. There is another notice served on tenants and occupiers on the lands, and on the principal occupiers of the adjoining lands. The solicitor having carriage prepares and lodges with the examiner a draft rental of the lands, which the judge approves of, having disposed of all the disputed questions relating thereto. The examiner settles the conditions of sale and division into lots, and the sale may be by private contract or by public auction. The purchaser is declared by the judge, and a draft of the conveyance is prepared according to directions issued by the court and sent to the solicitor having carriage. The draft is returned by the solicitor with his objections or comments annexed and lodged together with a certificate showing payment of the purchase-money, or of credit, in the examiner's office. The examiner or chief clerk settles the draft, of which, being approved by the judge, the purchaser obtains an attested copy from which he prepares the engrossment. The engrossment after comparison by the examiner is transmitted to the registrar, who causes a perfect copy thereof to be retained in his office, and, having had the engrossment executed by the several parties and sealed, causes it to be presented with the vouchers to the judge for execution.

Here is the precedent of a conveyance in fee simple:—

"I, A. B., one of the judges of the Landed Estates Court, Ireland, under the authority of an act passed in the twenty-second year of the reign of Queen Victoria, intituled 'An Act to facilitate the Sale and Transfer of Land in Ireland,' in consideration of the sum of 1,000*l.*, by William Hoskins, of Newport, in the county of Mayo, banker, paid into the bank of Ireland, to the account of the said court, and to the credit of

the estate of Anthony Foster, owner, ex parte John Stubbs, petitioner, do grant unto the said William Hoskins the town and lands of Kilbeggan, in the barony of Ardee, and county of Louth, containing 209 acres statute measure, or thereabouts, and described in the annexed map, with the appurtenances, To hold the same unto the said William Hoskins, his heirs and assigns for ever, subject to the leases and tenancies referred to in the schedule hereunto annexed. In witness whereof I, the said A. B., have hereunto set my hand and the seal of the said court this day of , in the year of our Lord ." (Madden's Landed Estates Court Act, 1854.)

The draft of a declaration of title is prepared in the same manner and lodged with the examiner. When settled by that functionary and approved of by the judge, an order for declaration of title may be made, which is to be published in at least two Dublin and two local, and in such other, newspapers as the judge may direct, and one month must elapse between the latest of such publications and the signature of the declaration (which is previously engrossed) by the judge.

The effect of the conveyance, and, when registered in the registry of deeds, of a declaration of title, is to confer an indefeasible title. Unless the purchaser puts in a special requisition to the contrary his title is recorded under the Record of Title Act, 1865. A declaration of title may also be recorded, but if so, the registration in the registry of deeds must be removed.

Only 2,000,000*l.* of property has so far been recorded under the Act of 1865—a fact attributed to the registration being voluntary and open only to indefeasible titles found through the Landed Estates Court.

The Landed Estates Court superseded in 1858 the Incumbered Estates Court created in 1849 for the sale of incumbered estates alone. This latter court sold property to the value of 20,000,000*l.* or an extent of land equal to about one-seventh the area of Ireland, and so beneficial was its working and so coveted the parliamentary title that fictitious incumbrances were resorted to in order to obtain that benefit. It was foreseen that fictitious sales would be resorted to with the view of obtaining through the court an absolute title (Hans. 150, p. 24)—hence the general power of selling unincumbered as well as incumbered estates, and of giving a declaration of title introduced into the Landed Estates Court Act. The joint amount of property sold between the two courts reaches 50,000,000*l.*, or land equal to about one-third the area of Ireland.

I have been thus minute in dealing with conveyance through

the Landed Estates Court because that tribunal has been signally successful, and because, whenever a proposal is made in England to simplify the transfer of real property, the court in Ireland is referred to as a model for legislation upon this subject. The truth of this remark may be verified by a glance at Hansard, vol. 152, and in last year's parliamentary debates on the Land Transfer Bill.

I now proceed to conveyance by means of registration. In order to make this subject more clear I shall transcribe some passages from the report of the Royal Commissioners on Registration of Title, 1857.

"Various systems and methods of registration are found actually existing in practice, for the protection of the title to landed and other property. The peculiarities and incidents of these different systems we think it necessary to bear in mind in the investigation of the subject before us.

"The various kinds of registry, or modes of registration, to which we refer, differ materially in their objects and their extent, and may be distinguished as follows:—

1. A register of incumbrances and securities for debt; as, the registers of judgments,* grants of annuities,† warrants of attorney,‡ crown debts and recognizances,§ and cases of lis pendens.‖
2. A register or enrolment of particular classes of deeds, or deeds having particular objects; as, the inrolment of deeds of bargain and sale,¶ disentailing assurances, or deeds executed for barring estates tail,** and bills of sale of personal chattels capable of delivery.††
3. A register of memorials, or brief abstracts of deeds and instruments; as, the registers of memorials of deeds and wills affecting lands in Ireland,‡‡ and in the counties of Middlesex,§§ and York.‖‖

* Established in 1692 by the 4 & 5 Will. & Mary, c. 20, and since varied and extended by the 1 & 2 Vict. c. 110, and 2 & 3 Vict. c. 11, and 18 & 19 Vict. c. 15.

† Established in 1777 by the 17 Geo. 3, c. 26, and varied and improved by the 53 Geo. 3, c. 141; subsequently repealed by the act abolishing the laws relating to usury, 17 & 18 Vict. c. 90, but restored in an amended form by the 18 & 19 Vict. c. 15, s. 12.

‡ Established in 1822 by the 3 Geo. 4, c. 39, extended by 6 & 7 Vict. c. 66.

§ Established in 1839 by the 2 & 3 Vict. c. 11, ss. 8, 9.

‖ Established in 1839 by the 2 & 3 Vict. c. 11, s. 7.

¶ Established in 1535 by the statute 27 Hen. 8, c. 16.

** Established in 1833 by the 3 & 4 Will. 4, c. 74, s. 41.

†† Established in 1854 by the 17 & 18 Vict. c. 36.

‡‡ Established in 1707 by the Irish Statute, 6 Anne, c. 2.

§§ Established as to the several Ridings in the years 1703, 1707, and 1735 by the statutes 2 & 3 Anne, c. 4, 6 Anne, c. 35, and 8 Geo. 2, c. 6.

‖‖ Established in the year 1708 by the statute 7 Anne, c. 20.

4. An inrolment of the deeds themselves, or full copies of them, and extending to all deeds; as, the inrolment of deeds affecting lands in the Bedford Level.*
5. A register of the title or actual ownership, independently and irrespectively of the past transactions or deeds by which it has been acquired. Such is the register in the books of the Bank of England of the public stocks and funds."

Under class 5 falls the Record of Title Act (Ireland) 1865; and a sixth class must be added for Lord Westbury's Act, 24 & 25 Vict. c. 53, which is at once a register both of title and of assurances.

"If the 4th of the above-mentioned systems were made to extend to the whole country, it would be what is termed a general register of assurances, and would supersede the 2nd and 3rd.

"If the 5th of these systems were extended to land, or if a register upon similar principles were applied to the ownership of land, it would exclude, or at all events might be made to render superfluous, the 2nd, 3rd, and 4th systems, and (with the addition of suitable provisions) the 1st also." (pp. 4, 5.)

The commissioners then point out that security of title and of transactions by means of notoriety and the perpetuation of evidence has been the specific object upon which the policy of registration is founded; that owing to the numerous evils attaching to the present state of the law, the sale and transfer of land are impeded and dealings in it discouraged, and that the objects aimed at in the reform of this branch of the law should be:—1. Security of title. 2. Simplification of title. 3. A record of the actual ownership. 4. Simplification of the forms of conveyance and general facility of transfer.

From the paragraph already cited, it appears there are a great many kinds of registration; but we have only to deal with classes 3, 5 and 6, viz.: registration of assurances—of titles—of both titles and assurances. It cannot be too well borne in mind that—"a register of titles has nothing on earth in common with a register of deeds" (Sp. of Sir Hugh Cairns, 1859, Hans. 152), and that by a registration of assurances, security, but not facility or cheapness of transfer, may be obtained. The security purchased by a registry of deeds is now generally considered to be bought at too dear a price. Here are some of the objections to such a system:—

First Objection.—"The vast bulk and increasing quantity of deeds and instruments which would have to be kept, and, on

* Established in 1663 by the Act for draining the Bedford Level, 15 Car. 2, c. 17, s. 8.

transfers, to be searched and examined. It is calculated by solicitors that these instruments would accumulate at the rate of 300,000 annually, requiring a registry of about 1,000 a day for every working day. The inconvenience of this as well as the cost would be so great, and it struck so forcibly the commissioners who reported in 1850, that they endeavoured to get rid of the objection by allowing protection in a variety of instances to unregistered assurances."

Second Objection.—"In the second place, the registration of assurances would involve a specific addition to the existing burdens on the transfer of land, without diminishing, as we think, except remotely and casually, any of the existing causes of expense, tardiness and difficulty in such transfer."

Third Objection.—"Increased complication. If any of the instruments affecting the title are withheld from the register, then the system becomes imperfect. If memorials only are registered, the original instruments, of which the memorials are given, must be searched for and copied or abstracted; and if the instruments are once registered they must remain on the register."

Fourth Objection.—"The fear of unnecessary and uncalled-for disclosures. The only legitimate object of making public or giving notoriety to any title-deeds is to prevent frauds in the transfer of property by ensuring notice to future contractors of all transactions which are to affect them. For that purpose, however, there can be no need of disclosing the whole internal history of the title for an indefinite period."

Fifth Objection.—"The enhanced difficulty of obtaining loans by a deposit of deeds. The transactions of this kind are very numerous. At present a respectable man in possession of title-deeds may and does obtain relief in sudden emergencies confidentially, easily, and at a few hours' notice. But if a registry of assurances were the only means of establishing title, and if this title could no longer be evidenced, even primâ facie, by the possession of deeds, transactions by deposit of deeds would be seriously impeded."

Sixth Objection.—"Possessory titles would be rendered less secure. These titles, namely, which depend more upon the fact of quiet and long-continued enjoyment than the technical sufficiency and accuracy of the various deeds which may have contributed to form the stages and steps of the title. The evidence of defects and slips in limitations and conveyances would by the register be perpetuated; and that possession, which might have continued undisturbed if the possessor had been allowed to keep his deeds in his box, would be made to invite criticism and attack by presenting a public record of some

frailty by which, or notwithstanding which, historically, the possession might have been acquired."

Seventh Objection.—"We are not satisfied that any mode of classification of deeds or of titles, for the purpose of furnishing the requisite indexes to a register of deeds, and affording the necessary facilities for search, has been or can be devised so as to be sufficiently free from complication. Without the means of ready, accurate, and complete searches, a system of registering deeds would only be a snare to purchasers." (Rep. Roy. Coms. pp. 10—14.)

The enumeration of the foregoing objections is sufficient to discourage any proposal for a registration of assurances. Next, therefore, of registry of title—understanding thereby a record of the actual owners of property, apart from any entry of the muniments of title, by which their rights to that property were conferred or ascertained. The following are some of the plans put forward to accomplish this object:—

First Plan.—The first of these plans (Mr. Scully's) proposes the establishment of a land tribunal, to which owners of land (including tenants for life and in tail, as well as in fee) may apply to have the land placed upon a public register, and declared to be registered land. The tribunal is to inquire into the nature of the applicant's title to the land and its existing circumstances, so as to decide upon the expediency of simply admitting it upon the register. When the land has thus become registered no subsequent act is to create any new estate less than a fee simple, except registered leases or easements; nor any new incumbrance, except registered debentures to a limited amount.

The plan also proposes that the owner of such registered land may further apply for a full investigation of title, and for an order declaring, in a conclusive form, all existing estates and incumbrances; and that, after the making of such order, the tribunal may give to each person, so found to be interested, a certificate of his title. It is also suggested, that, in order to obviate all chance of any injustice to third parties, the state may guarantee the title, upon payment of such small fees or premiums of insurance as will provide an indemnity fund to compensate persons whose prior rights might be superseded; but this guarantee is not an essential portion of the plan.

The privileges considered to be incident to this plan are:—

1. A parliamentary or indefeasible title, when conclusively declared by the tribunal;
2. A power to transfer by simple entry the registered land;
3. A further power to obtain on its credit terminable land

debentures, transferable either by simple entry like government stock, or by simple delivery like bank notes or bills of exchange.

The leading object of these debentures is to avoid the existing . . . complexity of incumbrances, and gradually to supersede all other kinds of charge, such as mortgages, legacies, family portions, quit rents, tithe rent-charges, annuities, judgments, recognizances, crown bonds, decrees, orders, and rules of court.

The *objections* to this plan are:—1. A land tribunal with judicial powers to decide conclusively upon all titles to land cannot be established advantageously unless where, owing to encumbrance or otherwise, the object and effect would be to obtain a new proprietary. 2. The absence of provisions for protecting beneficial and equitable interests. 3. As to Land Debentures—the absence in England of any adequate machinery for ascertaining judicially the value of land through a public map or general valuation.

Second Plan (Mr. Wilson's).—The second plan is described in a word, as registration of the freehold. This plan proceeds on the hypothesis that possession is the root of title; bearing in mind that by possession the possession of the freehold is meant, and by freehold a presumptive fee simple. Credit, therefore, is given to possession until it is shown to be wrongful. The fact, that the property is held by the person who is seen to hold it, is presumed to be coincident with the right of property, until the contrary appears. Acting on this hypothesis, the freeholder as thus defined is always to be entitled to have his property registered. But since there may be other rights besides the freeholder's, these rights are to be dealt with as qualifications of the freeholder's presumptive title; for the possession is not necessarily the whole of the evidence upon which the title rests; it should rather be considered as the basis of the evidence, or, as it were, the starting-point of the inquiry. When, therefore, other rights exist, protection is to be given to them, and they are to be capable of registration under the heads of "Charges and Notices." Registration of charges and notices is to consist, in effect, of the registration of written instruments or assurances; . . . The registration of the freehold is to be provisional in the first instance, that time may be allowed to interpose the registration of existing incumbrances or adverse titles. It is further proposed that a map of all the land in the kingdom, divided into parishes or districts, should be made by authority, on which each field or other materially-defined portion of the surface of the country should be distinguished by a numerical symbol. This map is to be made the basis of a book of

reference containing the same numbers as those on the map, with the description and contents of each division, and the names and addresses of the different freeholders. The register at the outset would be formed on the spot by an assistant registrar or commissioner, sent down to the different parishes for the purpose of receiving claims; and the assistant registrar would in substance follow the practice prescribed by the General Inclosure Act, 8 & 9 Vict. c. 118, a limited time being allowed for appeals, with an extension of time in favour of persons under disabilities.

The objections to this plan are—1. The necessity of the commission. 2. The consequent compulsory registration of title. 3. The consequent stirring up of dormant claims. 4. The introduction of a mass of documents. 5. Impediment to the sale of land during provisional registration. 6. The expense, delay, and difficulty of mapping the whole country, settling disputed questions of boundaries, and of revising map from time to time.

Third Plan (Mr. Cookson's).—This plan is founded on the belief that the transfer of land may for many purposes be assimilated to a transfer of stock. Every person, who, in respect of power or interest, has the absolute right of disposing of the fee simple of property in land, would, according to this plan, be entitled to put the estate on the register, and to transfer the ownership thereof to any other person, subject to such rights and interests as were created before and existed at the time when the registration of the property was effected. . . . . Registrar is to be empowered to warrant a title found to be perfectly marketable against all claims that might be brought against it. Persons having limited interests are to be enabled to protect themselves by distringases, to operate in the same way as stop orders on the disposition of stock in the funds. A similar mode of registration is likewise provided, by means of a subordinate register, for leaseholders. This plan does not provide for the registry of anything beyond the simple transfer of the ostensible ownership in fee and leases. Dealings which concern partial estates or equitable interests only will not be assisted or protected by the registrar, except when (as against an improper disposition by the registered owner) a distringas is put on. In fact, the purpose of this plan is, to attach to each landed estate a formal and ostensible proprietorship, to which the right of sale and transfer may be incident, in cases where the whole fee simple is intended to be disposed of, and to remit those who in any case may have right to restrain the sale or transfer, or to complain of it, or are interested in its proceeds,

to the protection of the distringas, or to their personal claim against the individual.

The objections to this plan are—1. Transfers by the registered owner are prevented by mortgages protected by distringas, and mortgagees must either be placed on register as owners in lieu of their mortgagors or be content with the protection of a distringas. 2. The complication and litigation that would arise from general liberty of entering distringases on oath of parties stating that they had an interest in the land and on an ex parte order of the Court of Chancery.

Fourth Plan.—This plan is that suggested by the Royal Commission itself. A land register and transfer office for England and Wales to be established in London under the management of a registrar general; and branch offices to be also established in different districts throughout the kingdom, subject to the orders and regulated by the authority of the registrar general. The registration to extend to all corporeal hereditaments, except copyholds.

All owners or proprietors of land, who have the right of possessing or the power of disposing of it in fee simple, to be at liberty to apply for the registration of the ownership; so that such ownership, or the title to the land which is the subject of the same, may thenceforth be manifested by the register alone.

Registration of title to be twofold—one enabling the registered owner at once to transfer the estate with a present or immediate statutory title; the other registration of actual ownership, without the power to transfer an immediate statutory title.

A certificate of warranted or unwarranted ownership to be delivered to the party applying and to be duly authenticated by seal of the office, bearing on its face the name of the registered owner, the lands registered, the incumbrances (if any) to which they are subject, and a reference to the indexes relating to the entry in the books of the registry.

The general effect of the registration—that for the purposes of transfer, the registered ownership will at all times represent the fee simple of the property, subject to the charges and leases admitted on the register. Unwarranted ownership to be free from all subsequent incumbrances not registered after registration—but to be subject to prior incumbrances.

Registered ownership, whether warranted or unwarranted, to be subject to easements, general taxes, and short leases at rack rent, where the lessee is in possession.

Unregistered interests to be protected by inhibitions and caveats.

The registered ownership to be transferred by a short deed

and an entry of the transferee's name in place of the transferor's —the old certificate being cancelled and a fresh one delivered.

There is then provision for the registration of incumbrances and of leases for twenty-one years or upwards—the mode of transferring these latter being in all respects similar to that of passing the ownership in fee. The advantages of the system will consist in giving facilities to the sale and transfer of land in the following respects:—

1. It will secure the principal benefits and advantages sought to be attained in a registration of deeds.
2. The system will render unnecessary retrospective investigation of title, as to all dealings subsequent to the commencement of the registration, and will gradually operate to dispense with the investigation altogether.
3. It will simplify the title to real property for the future (though it will not, except where warranty is obtained, confer at the outset a parliamentary title as against interests existing anterior to the registry), and it will have this effect, even though no concurrent improvements are effected in the general law of real property.
4. It will make purchasers of the fee and leases perfectly secure.
5. It will simplify to the utmost extent the forms of transfer and the modes of conveyance.
6. It will tend to increase the saleable value of land.

Acting upon the suggestions of the Royal Commission of 1857, the present Lord Chancellor—then Sir Hugh Cairns (Solicitor-General) brought two bills into the House of Commons substantially embodying the plan they recommended; the important points of difference being that the bills of 1859, (1) established a new tribunal for passing judgment on titles to land, without which no one could register: (2) restricted the class of titles to be placed on the register.

A change of government, however, occurred, and so the bills, which had been read a second time, were at an end.

In the year 1862 the subject was resumed, and the act was passed of which we have now to examine the working (Lord Westbury's Act). By this act there is established a registry of estates of freehold tenure, and leasehold estates in freehold lands. The proceedings commence in the manner described by the 5th, 6th, and 7th sections as follows:—

Sect. 5. On application for the registration of a title as indefeasible, the title shall be examined by the registrar and examiners of title hereinafter mentioned, in such manner as general orders shall direct. No title shall be accepted for

registration as indefeasible, unless it shall appear to be such as a court of equity would hold to be a valid marketable title.

Sect. 6. Disputes on matters of title to be referred to a judge of the Court of Chancery.

Sect. 7. If the title shall appear to be good and marketable, the applicant shall furnish to the registrar, and he shall examine and settle for the purposes of registration:—

First, an exact description of the lands to be registered.

Secondly, a statement of the persons, or classes or descriptions of persons, that are or may become entitled to such lands, and of the estates, powers, and interests that exist, or may arise or become vested in such persons respectively.

Thirdly, a statement of the mortgages, charges, and incumbrances affecting such lands, or any part thereof, and of the persons entitled thereto, both at law and in equity.

To identify the lands maps are required. Then notices are to be published and served on adjoining proprietors and persons having any interest or claim in the lands. Supposing all objections disposed of, registration is to be made in the manner prescribed by section 14:—

First, the registrar shall enter in a book—to be called "The Register of Estates with an indefeasible Title"—such description of the estate as shall be finally approved of, and shall annex thereto any map or plan, which shall be deemed necessary, and shall distinguish the estate so entered by a particular number or numbers, and the entry shall refer to another book to be entitled—"The Record of Title to Lands on the Registry."

Secondly, in the last-mentioned book under the same number or numbers shall be entered, in concise terms, an exact record of the existing estates, powers, and interests in the land so registered as aforesaid, and the names and descriptions of the persons, or classes of persons, that are or may become entitled thereto respectively.

Thirdly, in a book to be entitled "The Register of Mortgages and Incumbrances," shall be entered, under the same number or numbers, an account of all the charges and incumbrances affecting the lands or any part thereof, or the estate or interest therein of any person named in the record of title.

The nature of the title conferred by the registration is described in sect. 20.

"Subject to any exception . . . mentioned in such record of title, and to any right or interest thereby reserved, and to any registered charges or incumbrances . . . the persons originally and

from time to time named and described in such record of title as aforesaid shall, for the purposes of any sale, mortgage, or contract for valuable consideration by such persons respectively, be and be deemed to be, as from the date of registering such record by the registrar, or from such time as shall be fixed by him therein, absolutely and indefeasibly possessed of and entitled to such estates, rights, powers, and interests, as shall be defined and expressed in such record against all persons, and free from all rights, interests, claims, and demands whatsoever, including any estate, claim, or interest of her Majesty, her heirs and successors."

There are also provisions for registration without an indefeasible title. By sect. 32, it is provided :—

"From and after the registration of any land, every estate or interest, use, trust, mortgage, charge, lien, right, or title granted, declared, arising, becoming vested, or in any manner created, or coming into existence in, to, upon, out of, or affecting such land or any part thereof (except as herein excepted), shall be entered, described or noticed in the record of title or register of incumbrances, to be so kept as aforesaid."

Cautions and injunctions protect unregistered interests. When registered, land may be transferred in the modes prescribed by the 63rd section :—

"All registered land and every part thereof may be conveyed, changed, settled, dealt with, or affected in or by any of the following modes or dispositions, that is to say,

First, by a statutory disposition in any of the forms described in this act.

Secondly, by endorsement on the land certificate.

Thirdly, by deposit of the land certificate.

Fourthly, by any deed, will, judgment, decree, or instrument, by which such land, if not registered, might now, according to law, be conveyed, charged, settled, devised, dealt with, or affected.

"But no equitable mortgage or lien on registered land shall be created by a deposit of title deeds."

The contents of the land certificate are specified in sect. 68.

"The certificate shall contain, first, a copy of the description of the same lands as appearing in the registry of estates, with all the entries relating thereto ; and secondly, a copy of the entries relating to the same lands appearing in the record of title ; and thirdly, a copy of the entries in the registry of incumbrances of the mortgages, charges, claims, and liens on, or affecting, the estate and interest of such owner ; and such certificate shall certify whether such lands are registered with

or without an indefeasible title, and shall be distinguished by the number under which the lands are registered in the 'Register of Estates,' and shall contain all such other particulars as are material or useful for the purpose of manifesting the exact nature of such owner's estate and interest."

The total number of applications for registration made between the 15th October, 1862, and the 10th January, 1868, was 507.

The causes of the act's failure are thus summed up—

1. The delay, trouble, and expense of registering titles.
2. The fear of litigation during the process.
3. The sense that a registration of all interests in the lands will neither protect owners nor facilitate transfers, but will prove a hindrance and burden.

These causes are inherent in the structure of the act itself—

(a.) Because it requires all titles to be without blemish, whereas purchasers are content to overlook small blemishes.

(b.) Because it requires all titles to be of 60 years' length, whereas purchasers are content with less, and mortgagees also, purchasers rarely, if ever, suffering from taking short title.

(c.) Because it requires that the description of the land shall bind strangers, whereas purchasers are content to make their own inquiries on such matters.

(d.) Because there is no benefit in transferring the estate in the registry.

(Rep. Roy. Comms. appointed to inquire into operation of Land Transfer Act, 1870.)

The Commission then submitted as the result of their deliberations, that, collateral with Lord Westbury's Act, a new measure should be passed carrying out the plan advocated by the Commission of 1857. Accordingly, Lord Selborne brought in a bill adopting to a great degree their proposals; and this bill and the materials from which it was framed were put into the hands of the present Lord Chancellor, when the Conservatives came into power last year. With such assistance, Lord Cairns introduced a Land Transfer Bill during the last session, which bill, after having passed the Lords and been read a second time in the House of Commons, was eventually withdrawn. In the present session the Lord Chancellor introduced the Land Transfer Bill now before the country—which differs in some few respects from its predecessor—the most important divergence being that under the present scheme registration is

not made compulsory. I shall now endeavour to give you some account of this measure, which is set forth in one hundred and twenty-eight sections arranged under five parts.

Part I.

Entry of Land on Register of Title.

(1.) Freehold Land.

Sect. 5. "A land registry shall be established, and on and after the commencement of this act, the following persons (that is to say):—

(1.) Any person who has contracted to buy for his own benefit an estate in fee simple in land, whether subject or not to incumbrances; and

(2.) Any person entitled for his own benefit at law or in equity to an estate in fee simple in land, whether subject or not to incumbrances; and

(3.) Any person capable of disposing for his own benefit by way of sale of an estate in fee simple in land, whether subject or not to incumbrances,

may apply to the registrar, under this act, to be registered, or to have registered in his stead any nominee or nominees, not exceeding the prescribed number, as proprietor or proprietors of such freehold land with an absolute title or with a possessory title only: Provided, that in the case of land contracted to be bought, the vendor consents to the application."

An absolute title shall not be registered unless approved of by the registrar, a possessory title, on giving the evidence and serving the notices prescribed. Sect. 6.

Sect. 7. "The first registration of any person as proprietor of freehold land (in this act referred to as first registered proprietor) with an absolute title, shall vest in the person so registered an estate in fee simple in such land, together with all rights, privileges, and appurtenances enjoyed or reputed as belonging or appurtenant thereto, subject as follows:—

(1.) To the incumbrances, if any, entered on the register; and

(2.) Unless the contrary is expressed on the register, to such liabilities, rights, and interests, if any, as are by this act declared not to be incumbrances; and

(3.) Where such first proprietor is not entitled for his own benefit to the land registered as between himself and any persons claiming under him, to any unregistered estates, rights, interests, or equities to which such persons may be entitled,

but free from all other estates and interests whatsoever, including estates and interests of her Majesty, her heirs and successors."

Registration of possessory title not to prejudice any interest subsisting or capable of arising at time of registration, but with that saving to have the same effect as registration of absolute title. Sect. 8.

A qualified title may be registered—i. e. a title subject to certain estates and interests reserved and entered in the register. Such title subject to such reservations to have the same effect as an absolute title. Sect. 9.

A land certificate to be delivered on application to first registered proprietor. Such certificate to state whether title absolute, qualified, or possessory. Sect. 10.

(2.) Leasehold Land.

Sect. 11. "A separate register shall be kept of leasehold land, and on and after the commencement of this act any of the following persons; (that is to say):—

(1.) Any person who has contracted to buy for his own benefit leasehold land held under a lease for a life or lives, or determinable on a life or lives, or for a term of years, of which more than twenty-one are unexpired, whether subject or not to incumbrances; and

(2.) Any person entitled, for his own benefit at law or in equity, to leasehold land held under any such lease as is described in this section, whether subject or not to incumbrances; and

(3.) Any person capable of disposing, for his own benefit, by way of sale, of leasehold land held under any such lease as is described in this section, whether subject or not to incumbrances,

may apply to the registrar to be registered, or to have registered in his stead any nominee or nominees, not exceeding the prescribed number, as proprietor or proprietors of such leasehold land, with the addition where the lease under which the land is held is derived immediately out of freehold land, and the applicant is able to submit for examination the title of the lessor, of a declaration of the title of the lessor to grant the lease under which the land is held: provided,—

"That in the case of leasehold land contracted to be bought, the vendor consents to the application."

Lease, or when lost verified copy thereof, to be deposited with registrar on application for registration. . . . . Leasehold land under absolute prohibition of alienation not to be registered.

Sect. 13. "The registration under this act of any person as first registered proprietor of leasehold land with a declaration that the lessor had an absolute title to grant the lease under which the land is held shall be deemed to vest in such person the possession of the land comprised in the registered lease relating to such land for all the leasehold estate therein described, with all implied or expressed rights, privileges, and appurtenances attached to such estates, but subject as follows:—

(1.) To all implied and express covenants, obligations and liabilities incident to such leasehold estate; and

(2.) To the incumbrances (if any) entered on the register; and

(3.) Unless the contrary is expressed on the register, to such liabilities, rights, and interests as affect the leasehold estate, and are by this act declared not to be incumbrances in the case of registered freehold land; and

(4.) Where such first proprietor is not entitled for his own benefit to the land registered as between himself and any persons claiming under him, to any unregistered estates, rights, interests, or equities to which such persons may be entitled,

but free from all other estates and interests whatsoever, including estates and interests of her Majesty, her heirs and successors."

Sects. 14, 15, correspond as to leasehold with sects. 8, 9, as to freeholds.

Instead of a land certificate is given an office copy of the registered lease with an endorsement, whether any declaration, absolute or qualified, as to the title of the lessor has been made.

Sect. 17. Regulations as to examination of title by registrar.

Sect. 18. Liability of registered land to easements and certain other rights.

Part II.

Registered Dealings with Registered Land.

Mortgage of Registered Land.—A registered proprietor of any freehold or leasehold land may charge any such land with the payment of any principal sum of money with or without interest—and such charge shall be completed by entering on the register the person in whose favour the charge is made as proprietor of the charge—who may obtain a certificate of charge in the prescribed form sect. 22.

Sect. 28. "Subject to any entry to the contrary on the register, registered charges on the same land shall as between

themselves rank according to the order in which they are entered on the register, and not according to the order in which they are contracted."

On cessation of charge, entry on register to be annulled.

Transfer of Freehold Land.—Registered proprietor may transfer in prescribed manner (by delivery of land certificate) —such transfer to be completed by entering transferee as proprietor on register. Sect. 29.

Transfer of Leasehold Land.—Registered proprietor may transfer in prescribed manner (by delivery of office lease)—such transfer to be completed by entering transferee as proprietor on register. Sect. 34.

Transfer of Charges.—Registered proprietor may transfer in prescribed manner—such transfer to be completed by entering transferee as proprietor of charge on register. Sect. 40.

Part III.

Unregistered Dealings with Registered Land.

Sect. 49. "The registered proprietor alone shall be entitled to transfer or charge registered land by registered dispositions; but subject to the maintenance of the estate and right of such proprietor, any person, whether the registered proprietor or not of any registered land, having a sufficient estate or interest in such land, may create estates, rights, interests, and equities in the same manner as he might do if the land were not registered; and any person entitled to or interested in any unregistered estates, rights, interests, or equities in registered land may protect the same from being impaired by any act of the registered proprietor by entering on the register such notices, cautions, inhibitions, or other restrictions as are in this act in that behalf mentioned."

Sects. 53, 54. Cautions against registered dealings may be lodged: cautioner to be entitled to notice of proposed registered dealings.

Part IV.

Provisions supplemental to foregoing Part of Acts.

Sects. 60—64. *Caution against entry of land on register.*

Sect. 65. Facilities for registration of crown lands.

Sects. 66—72. Proceedings on and before registration.

Sects. 73—76. Doubtful questions arising on title.

Sects. 77—80. Land certificates, office copies of leases, and certificates of charge.

Sect. 81. Special hereditaments (incorporeal hereditaments in gross—severed mines).

Sects. 82—85. *General provisions.* 1. No trust to be entered on register. 2. No registration of any undivided share in any land or charge.

Sects. 86—104. Infants, Lunatics—Notices—Specific Performance—Rectification of Register—Fraud—Inspection of Register.

Part V.

Administration of Law and Miscellaneous.

Sect. 105. "There shall be an office in London to be called the Office of Land Registry, the business of which shall be conducted by a registrar to be appointed by the Lord Chancellor, with such number of officers (namely, assistant registrars, clerks, messengers, and servants,) as the Lord Chancellor, with the concurrence of the Commissioners of Her Majesty's Treasury as to number, may from time to time appoint." . . .

Sect. 117. "The Lord Chancellor, with the concurrence of the Commissioners of Her Majesty's Treasury, shall have power by general orders from time to time to do all or any of the following things:—

(1) To create distinct registries for the purpose of registration of land within the defined districts respectively, and to alter any districts which shall have been so created; and,

(2) To direct, by notice to be published in the "London Gazette," when (upon or after the commencement of this act) registration of land is to commence in any district, and the place at which lands are to be registered; and,

(3) To commence registration of land in any one or more district or districts, pursuant to any such notice; and,

(4) To appoint district registrars, clerks, messengers, and servants to perform the business of registration in any district which may from time to time be created a district for registration under this act.

The Lord Chancellor may, with the like concurrence, from time to time make, rescind, alter, or add to any order made in pursuance of this section."

Sect. 122. The registrar and staff under Lord Westbury's Act (which is abolished) to be the staff at the new office of land registry.

From the registration and other acts it is apparent what

frantic efforts have been made at various times to rid the country of some oppressive incubus. That incubus crushes with the weight of a millstone every transaction in relation to land, and is as fatal to the development of, as the invasion of an army of locusts is destructive to, agricultural prosperity. The scourge I allude to is the ordinary system of conveyancing now in vogue. Transfers of land are since the 8 & 9 Vict. almost invariably made by deed of grant, which, though extremely bulky as a rule, may still be described with sufficient accuracy as a concise compendium of most of the monstrosities the law of real property has been able to accumulate during eight hundred years of continuous aggregation. Like other indentures a deed of grant contains the eight parts mentioned by Coke. "There have been eight formall or orderly parts of a deed of feoffment, viz., 1, the *premises* of the deed implied by *Littleton;* 2, the *habendum*, whereof Littleton here speaketh; 3, the *tenendum*, mentioned by Littleton; 4, the *reddendum;* 5, the *clause of warrantie*" (now supplied by covenants for title); "6, the *in cujus rei testimonium*, comprehending the sealing; 7, the date of the deed, containing the day, the month, the yeare and stile of the king, or of the yeare of our Lord; lastly, the clause of *hiis testibus;* and yet all these parts were contained in very few and significant words, hæc fuit candida illius ætatis fides et simplicitas, quæ pauculis lineis omnia fidei firmamenta posuerunt." (Co. Litt. 6 a.) Now you must not expect me to untwist the marvellous lassoes the lawyers have knotted together out of the construction and operation of these various parts of a deed. Consider for instance the difference between a simple habendum and a habendum with a *scilicet:*—"As if a rent-charge of ten pounds be granted to A. and B. to have and to hold to them two, viz. to A. untill he be married, and to B. untill he be advanced to a benefice, they be joyn-tenants in the meane time, notwithstanding the severall limitations; and if A. die before marriage, the rent shall survive; but if A. had married, the rent should have ceased for a moietie, et sic è converso on the other side." (Co. Litt. 180 b.)

If the grant had been to A. and B., habendum to A. till he be married, and to B. till he be advanced to a benefice, they would probably be considered tenants in common. Again—grant to A. and B. habendum to A. for years, remainder to B. for years, is good; but lease of two acres to A. and B., habendum one acre to A. for years, the other to B. for years, is invalid (T. 4 Eliz.) (Hob. 172.)

I shall not trouble you with the other formalities and all the

incidents they involve—such as, what is a sufficient delivery? and, what is a material alteration sufficient to vitiate a deed? but I pass to the language of the instrument. After the scolding of your last letter, I had better say nothing about technical terms, nor shall I lay myself open to attack on that score by any particular comments. I content myself with the general observation, that the intrinsic unintelligibleness of the phraseology of sealed instruments is, for technical obscurity, compared with all other portions of the law, facile princeps; and that it will for ever remain an insoluble puzzle to all future generations, why the judges should have gone to the needless trouble of putting such mystifying interpretations on the Statute of Uses, since even before the 27 Hen. 8, the wording of deeds must always have remained secure from being correctly construed by the lay world! an insoluble puzzle, I say, unless, indeed, we suppose the ornaments of the bench were so habituated to special pleading, that they found it impossible to increase too much the insurmountable difficulties thrown in the way of the non-professional.

Let us next consider the subject-matter of a conveyance, and suppose a fee simple estate is contracted to be sold. From the moment the parties are ad idem and the contract is in writing, the property, as I have already said, passes to a purchaser in the view of a court of equity; and the vendor is bound to execute a good and valid legal conveyance within a reasonable time. By a good conveyance, I mean a conveyance of the estate with what is called a marketable title; in other words, a title which goes back for an antecedent period of sixty years. The vendor must furnish the vendee with an abstract of all the conveyances, devises, and dealings with the property during those sixty years. The vendee then makes searches in the registry offices for incumbrances, &c. If no such incumbrances are found and the abstract is approved of by counsel, the vendee or his solicitor prepares a draft conveyance, which is submitted to the vendor. This being approved by the latter, or an amended form being agreed to by the parties, the vendee or his solicitor has the original or altered draft engrossed on parchment duly stamped. This being executed and delivered by the vendor is the conveyance.

The expense in such a transaction is enormous, as a rule being about 10 per cent. on the purchase-money—the vendor bearing the cost of the abstract—the vendee of the conveyance. Why sixty years should be the root of title, Lord Westbury professed himself unable to divine. (Hans. 165, p. 351.) For it is hardly a good answer to say, that this period was devised

with regard to the duration of human life; and, in fact, if all the transactions during such a period appear in black and white on the abstract, the title, though considered perfectly safe and all that the Court of Chancery would ever require, is by no means indefeasible. Thus let A. who is tenant for life convey the estate in fee on attaining his majority. He may live to be eighty-one, and then his grantee will be able to give a marketable title, yet the purchaser from the latter will on the death of A. be ousted by the remainderman or reversioner.

Next as to—II. Conveyance ex testamento.

"The *testamentary* power over *land* was certainly in use among our Anglo-Saxon and Danish ancestors, though it seems to have been rather adopted from the remnant of the Roman laws and customs they found here, than brought from their own country; for as Tacitus, writing of the ancient Germans, says, successores sui cuique liberi et nullum testamentum. Spelm. Posthum. 21, 127. After the Norman Conquest the power of devising land ceased, except as to *socage* lands in some particular places, such as cities and boroughs, in which it was still preserved; and also except as *to terms for years or chattel interests* in land, which, on account of their original imbecility and insignificance, were deemed personalty, and as such were ever disposable by will. This limitation of the testamentary power proceeded, partly from the solemn form of transferring land by livery of seisin introduced at the Conquest, which could not be complied with in the case of a last will; partly from a jealousy of death-bed dispositions, but principally from the general restraint of alienation incident to the rigours of the feudal system, as it was *established* or at least *perfected* by the first William. See Wright's Ten. 172." (Mr. Hargrave's note (1); Co. Litt. 111 b.)

With this introduction I proceed to consider testamentary disposition of—I. Freeholds; II. Leaseholds; III. Copyholds.

I. *Disposition of Freeholds by Will*—and first, of fee simple estates. Before the acts of Henry VIII. no freeholds could be directly disposed of by will, save those which were devisable by custom; but indirect disposition was effectuated by a feoffment to the uses of a last will during the life of the testator, who devised or appointed the use as the case might be, and the use so devised or appointed was enforced by the Court of Chancery compelling the feoffee to discover on oath and carry into effect the trust thus created. The 27 Hen. 8, having annexed the seisin to the use, testamentary disposition by the method of a feoffment to the uses of a last will became impossible; but as power to devise property had become a necessity the 32 and the

34 Hen. 8, enabled tenants to dispose of two-thirds of their lands held in chivalry, and the whole of their lands held in common socage, the only formality being that the will should be in writing.

Devises permitted by custom need not have been in writing. The 12 Car. 2, c. 24, having changed all tenures in chivalry into free and common socage, all a man's freehold lands in fee became devisable.

A wide door had been thrown open to all kinds of fraud by having no proper precautions for the due authentication of wills under the statutes of Hen. VIII.—to suppress which it was enacted by the Statute of Frauds (29 Car. 2, c. 3), that every will disposing of freehold land should be in writing, signed by the testator or by some other person for him in his presence, and at his direction, and also attested and subscribed in his presence by three or more credible witnesses. Such continued to be the law till the Wills Act hereafter to be mentioned.

Of other freeholds—Estates pur auter vie were not devisable till made so by 29 Car. 2, c. 3, which required for their disposition the same formalities as for the disposition of freeholds in fee. Estates pur auter vie were not devisable at common law as being real estate; nor under the 32 and the 34 Hen. 8 as being less than fee simple. Quasi-entailed estates pur auter vie were formerly, as they still are, unbarred by testamentary disposition—the issue taking per formam doni in the absence of some disposition inter vivos by the donee in possession.

II. *Leaseholds for Years.**—Terms attendant upon the inheritance were required to be devised with the formalities prescribed for the disposition of the inheritance itself. So also were terms created under a will, inasmuch as they were a partial disposition of the freehold interest in right of which they were created. But terms in gross being but chattels were disposable as were personalty—that is to say: As to *quantity:* from the reign of Hen. II. to that of Car. II.—as appears from Glanville and Finch—a testator might dispose of the whole, a moiety, or a third of his goods according as he died, leaving neither wife nor child, leaving either wife or child, or leaving wife and child, respectively: As to manner—the will might be either nuncupative or in writing—the age for testamentary capacity being apparently (though this is a much disputed point) fourteen years in the case of males—twelve in the case of females.

III. Copyholds were not devisable at common law as being

* Satisfied attendant terms to cease from 31 Dec. 1845. 8 & 9 Vict. c. 112.

real estate; nor under the 32 and the 34 Hen. 8 as not being of socage tenure. Nor did the 29 Car. 2, c. 3, alter the law in their regard; so that up to the Wills Act a testator had to resort to a surrender to the uses of his will and then he could dispose of the uses just as the freeholder did before the 27 Hen. 8.

But now by the Wills Act (7 Will. 4 & 1 Vict. c. 26) all property (not entailed or quasi-entailed), whether real or personal—in possession or expectancy—acquired or to be acquired —or of what kind soever—may be directly disposed of by will; and all wills, save those of soldiers and seamen in actual service, are subjected to the same mode of execution—viz. they must be in writing, signed at the foot or end thereof by the testator or by some other person in his presence and by his direction, and such signature must be made or acknowledged in the presence of two or more witnesses, present at the same time, who in his presence and in presence of each other, shall thereunto subscribe their signatures. The will speaks from the death of the testator not from the date of execution. The age for testamentary capacity is twenty-one.

From this description, it appears what an incomparable facility in mode of transfer disposition ex testamento has over conveyance inter vivos—and how easily one bold statute reduced heterogeneous discordances, as to different kinds of property, to one homogeneous uniformity. That same statute brought back to a testator the ordinary meaning of language, so that, when he says—"I devise my real property to A."—the devisee gets the testator's full interest in that property and not merely a life estate. So when a testator says—"I give all my property to B."—B. will become entitled to the entire real and personal estate of the deceased, including whatever he had a general power of appointment to dispose of.

Why has the Wills Act been the success it has proved? because, it may fairly be owned, it has placed all property—real or personal—almost on the same footing for its purposes; and, according as you assimilate the law of immoveables to that of moveables, you will improve the methods of transfer as every other portion of the system.

There, then is my answer:—Make the law of chattels exclusive and co-extensive with all property, and you have the simplest of conveyances cut and ready to your hand. On a transfer of realty the transferee will enter into possession as he would do on a transfer of personalty; and he will receive a receipt for the purchase-money, which shall state in plain English for what estate he has paid; whilst the receipt his vendor held for his

own purchase will be cancelled at the stamp office simultaneously with the issue of another receipt for the new transaction. The receipt might indeed be the same as that given on the discharge of a mere debt—as the short bar of six years under the Statute of Limitations would prevent the accumulation of receipts, which would otherwise in time become as burthensome as the most elaborate mode of transfer. I shall not, however, develop the only thorough plan that can be suggested for dealing with this matter, and which, if adopted, would dispense with all the intricacy and technicality of conveyancing.

I repeat, if you are determined still to maintain the barbarous relics of feudalism, transfer by land certificate under the new Land Transfer Bill is perhaps the best expedient that presents itself—an expedient, too, which pulverizes the nut you gave me to crack in requesting me to draw a conveyance without technicality.

Yet that you may hide your head in confusion and be forced to confess, that barristers with subtlety, and attornies and solicitors with prolixity, have made of our legal instruments crafty and resistless engines for the carrying out of their own sinister ends and for the destruction of the unwary, attend to the simplicity of transfer in ancient times:—

Here is an Anglo-Saxon transfer of the eighth century:—

"Ego Forter, famulus famulorum Dei, pro redemptione animæ meæ unum carratum dedi Aldberhto abbati quæ scita est juxta fluvium Æsce, ad portum que dicitur Bledenhithe, ad insulam parvam et ad ecclesiam beati Martini confessoris, in propriam substanciam, habendum donandumque cuicumque voluerit. Qui hanc cartam infringere temptaverit, sciat seipsum a communione sanctorum separatum et ab Omnipotenti Deo.

+ Ego Forter consensi et subscripsi. Acta est autem hæc donatio anno DCCXII. indictione prima." (Chartæ Anglo-Saxoniæ, Kemble, Tom. 1.)

Here is a transfer during the middle ages:—

"Sciant præsentes et futuri, quod ego Henricus, Dei gratia abbas et conventus Sancti Petri Gloucestriæ, concessimus Willelmo tinctori et Aliciæ uxori suæ, et hæredibus eorum, tres æras prati in prato vaccarum apud Munstreworthe quas Rogerus filius Rogeri filii Ceciliæ nobis dedit in feodo et hæreditate et carta sua confirmavit; tenendas et habendas de nobis, sibi et hæredibus suis, libere et quiete, pro tribus solidis octo denariis nobis annuatim persolvendis videlicet medietatem ad festum Sancti Michælis et aliam medietatem ad annunciationem Beatæ Mariæ. Idem vero Willelmus juramentum, etc.

"In cujus rei testimonium præsens scriptum in modum cyro-

graphi," etc. (Historia et Cartularium Monasterii Sancti Petri Gloucestriæ, vol. ii.—The Chronicles and Memorials of Great Britain and Ireland published under the direction of the Master of the Rolls.)

Such is ever the brevity of honesty—such its clearness and precision. Oh! Dick Roe, if you could but throw off that encrusted nature of chicanery and duplicity it has taken you all your manhood to acquire! If you could but expunge the gloomy black-letter and dry up the midnight oil!

> "Antè leves ergo pascentur in æthere cervi,
> Et freta destituent nudos in littore pisces:
> Antè pererratis amborum finibus, exul
> Aut Ararim Parthus bibet, aut Germania Tigrim,
> Quam nostro illius labatur pectore vultus."

Even so unfading would then be the excellence of your character in the memory of

Your devoted servant,

Richard Roe, Esq. JOHN DOE.

BLACKACRE,
Manor of Sale.

Dear Doe,

Have you ever witnessed the calm dignity and imperturbable serenity with which a man of irreproachable character listens to an outpouring of vile abuse? And if provoked by a bystander to refute the reviler, his only answer will be:—"Let him go on—he will do himself far more harm than anything I might say could do him—out of his own mouth will come the most cogent of refutations." Such is the reply I might well give to one who asked, would I sit silent under the multifarious charges you have brought against the law.

You begin with an enumeration of the ancient modes of conveyance (for I limit myself to your last note), in order to hold them up to derision and disgust—you conclude with an account of the wretched state, to which an abandonment of those same modes have reduced us. Who ever heard, from the first of the Plantagenets to the twenty-seventh year of the second of the Tudors, a single complaint against the methods of transfer or a wish expressed for that wicked goblin—registration? Yet how numerous and complex must have been the dealings with land, seeing it was practically the only species of property recognized!

And when chattels do at length struggle into notice, what is the first thing we hear of them? Why, that one of the ordinary methods of their transfer is so ready an instrument of fraud that its operativeness has to be curtailed:—"All deeds of gift of goods and chattels made or to be made of trust to the use of the person or persons that made the same deed of gift"—are declared "void and of none effect." (3 Hen. 7, c. 6.) It is of no avail to cite 50 Edw. 3, c. 6, and 2 Rich. 2, stat. 2, c. 3, wherein gifts of freeholds and gifts of chattels are placed on the same footing, by reason of the frauds committed by persons fleeing to the franchise of Westminster or of St. Martin-le-Grand, London, or other such privileged places; for the privilege, not the mode of transfer, was the effective means of dishonesty. And what is the first great resolution on the Statute of Fraudulent Gifts, 13 Eliz. c. 5—applicable to both moveables and immoveables—but Twyne's case—a perusal of which will show how difficult it is to distinguish between a valid and an invalid transfer of goods.

It is no small virtue to forego all personal considerations in order to instruct the ignorant; and, were it not for the benefits I one day hope to reap in the éclat of my scholar, I should never be unselfish enough so to lower myself as to condescend to examine these extraordinary statements of yours, which if left to themselves are their own contradiction. You are certainly to be congratulated on that harum-scarum style of reading, which swallows here and devours there, without the least attempt at mastication or digestion. No doubt erudition on the inch-deep scale is generally, as things go, the most useful, supplying as it does an inexhaustible fund of the small-talk order—the only kind of conversation admissible in society—and therefore the criterion the world has for pronouncing a man a genius or a blockhead. Unluckily, however, your letter is not addressed to the million, which has scarce time to look and read, but to one far removed from the busy hum of men, who will sit down and con over each line and syllable sent for his perusal—one to whom nothing is more nauseous than cabbaged and garbled plagiarism. When you were about it you might as well have given the whole passage from Blackstone:—"The use of seals as a mark of authenticity to letters and other instruments in writing, is extremely ancient. We read of it among the Jews and Persians in the earliest and most sacred records of history (1 Kings, c. xxi.; Daniel, c. vi.; Esther, c. viii.) . . . But in the times of our Saxon ancestors, they were not much in use in England. . . . The method of the Saxons was for such as could write to subscribe their

names; and whether they could write or not, to affix the sign of the cross; which custom our illiterate vulgar do, for the most part, to this day keep up, by signing a cross for their mark, when unable to write their names. And indeed this inability to write, and therefore making a cross in its stead, is honestly avowed by Cædwaller, a Saxon king, at the end of one of his charters.* In like manner, and for the same insurmountable reason, the Normans (a brave but illiterate nation), at their first settlement in France, used the practice of sealing only, without writing their names, which custom continued when learning made its way among them, though the reason for doing it had ceased; and hence the charter of Edward the Confessor to Westminster Abbey—himself being brought up in Normandy,—was witnessed only by his seal, and is generally thought to be the oldest sealed charter of any authenticity in England. At the Conquest, the Norman lords brought over into this kingdom their own fashions, and introduced waxen seals only, instead of the English method of writing their names, and signing with the sign of the cross." (Bk. ii. c. 20.)

Indeed the barons did not possess the accomplishment of penmanship—I frankly avow it; but I have yet to learn, that, chivalry to which the best breeding of the nineteenth century is boorishness; that, honour to which the code of existing high-mindedness is shame; that, aspirations to which our boasted philanthropy is mean and grovelling – are as feathers when put in the balance with that quill-driving art, which the lowest counter-jumper would think it too insignificant to mention—from the acquisition of which not all the bungling of all the school boards in creation can exclude the poor gutter-arab!

To be able to write is not that supreme and all essential attribute you would have us believe. How has the genesis of law been described? From the isolated "themists" or direct pronouncements of Zeus to the precedents thereupon formed; and then from these to customs, upon which direct legislation is built—*oral tradition* being the instrument of transmission till superseded by the written statute or code of the legislator.† Through what channel have the immortal poems of Homer come down? You can hardly be ignorant of the general opinion entertained by the critics, for the σήματα λυγρά (Il. vi. 168) may be explained as symbolic just as well as graphic representations, whilst there is every probable ground for sup-

* "Propriâ manu, pro ignorantiâ litterarum, signum sanctæ crucis expressi et subscripsi." (Seld. Jan. Ang. i. 1, s. 42.)

† Maine's Ancient Law.

posing, that, prior to the general collection by Pisistratus—at least originally—both the Iliad and Odyssey were handed down from generation to generation of rhapsodists by mere recitation. Did the greatest of human moral philosophers need pen and ink to promulgate those ethical lessons, which shall be taught as long as the race of man endures? Nor is it so very plain we should never have heard of Socrates but for Plato, who somewhere deplores the existence of books at all, seeing they so extinguish original thought. The very fact of written memorials makes disciples less careful of the doctrines and reputation of their master; and as the Pythagorean philosophy, though unwritten, was preserved and diffused, so the Aristotelian ethics, though written, were during their ages of concealment practically lost and unknown!

If, however, you insist, I am willing to allow that the inability of the barons to subscribe their names to documents was somewhat blameworthy or, at any rate, not altogether creditable. But, in retaining seals, do we retain the badge of barbarism? Do our instruments retain the stigma of shame because they so often employ the term "assigns"—originally introduced for the sake of those born out of wedlock.*

Do we retain the Ptolemaic theory of the universe, because we speak of the rising and setting of the heavenly bodies and the motion of the sun and stars, as if Copernicus and Galileo had never lived? Did the early Church retain idolatry, because she appropriated to Christian worship the temples of the converted Pagans? Convenience and expediency have suggested the propriety of adoption in each case; and you might as well fire out at the Rhodian law of general average, or indeed at the jus receptum at large, as at the employment of seals—for it is present adoption not past antecedents that must be regarded in either. But it is the old story—when you have no case, abuse the attorney on the other side! and so, the gnawing consciousness of the intrinsic weakness of your attack upon our system of conveyancing has driven you to that last and meanest of shifts—to distract attention by singling out some irrelevant topic and thereupon emptying the vessel of malignant spleen.

It is to be lamented that virulent diatribes against the form and framework of our deeds have so monopolized your attention as to leave no room for an examination or account of their genealogy. This with your leave I shall now supply.

* "Ne ceux qi entrent par feffemenz de bastardz, dount les bastardz ne furent mie feffez a lour assignez; car pur favour de bastardz furent primes assignez trovez pur mettre en feffementz." (Britton, L. ii. c. 16.)

"Anglo-Saxon conveyances consisted," he says, "principally of these things:—

"1st. The grantor's name and title are stated. In the older charters the description is very simple. It is more full in those of a later period; but the grants of Edgar are generally distinguished from those of other kings by a pompous and inflated commencement.

"2nd. A recital is usually inserted, in many instances preceding the donor's name. Sometimes it states his title, or some circumstances connected with it. Sometimes the recital is on the brevity and uncertainty of life. . . .

"3rd. The conveying words follow, which are usually 'Do et concedo;' 'donare decrevimus' . . . or other terms of equivalent import, either of Latin or Saxon.

"4th. The person's name then occurs to whom the land is granted. . . .

"5th. What lawyers call the consideration of a deed is commonly inserted. This is sometimes 'Pro intimo caritatis affectu,' 'Pro ejus humili obedientiâ,' and such like. Often it is for money paid, or a valuable consideration.

"6th. The premises are then mentioned. . . .

"7th. The nature of the tenure is then subjoined, whether for life or lives, or in perpetuity, or whether any reversion is to ensue.

"8th. The services from which the land is liberated and those to which it is to continue subject are then mentioned.

"9th. Some exhortations—not to disturb donation, and some imprecations on those who attempt such disturbance.

"10th. The date, the place of signature if a royal grant, and the witnesses usually conclude it. The date is sometimes in the beginning."*

"No very material change in the form or language of conveyances appears to have ensued immediately upon the Norman Conquest. The language, until the time of King John, was Latin or Anglo-Saxon; after that reign French generally came into use along with Latin; and during the reigns of Edw. III., Rich. II., Hen. IV., and Hen. V., legal instruments were frequently in the French language. . . . The 'Boke of Instruments,' published in 1543, contains more Latin forms than English; but 'West's Symbolæography,' which appeared in 1594, more English than Latin.

"About the reigns of Hen. III. and Edw. I. conveyances assumed the shape, and the division into several formal parts,

* Turner, Hist. Anglo-Saxons, ii. 568.

which are still generally in use." (Davidson's Precedents and Forms in Conveyancing, Introd.)

Modern conveyancing was gradually brought to perfection by Nathaniel Pigot, who died 1739, James Booth, Mr. Fearne, Ralph Bradley and Charles Butler, who flourished at the close of the last century, to whom must be added Lewis Duval, who died in 1844.

Thus by slow progress, by laborious and continuous improvement, have our instruments acquired that matchless perfection of precision, completeness, and provision, which all the beadledom registration and notarial interference in esse or in posse have not and never shall bestow upon our Continental neighbours—a perfection that could never have been attained amongst ourselves but for the humanity, generosity, and charity of the good old times, when the much-favoured papists were tolerantly shut out from every profession, and, in consequence, devoted their whole energies to the one branch of the law they might follow, and that branch having thus a greater amount of attention happily concentrated upon it was brought to a higher degree of excellence than any other.

I shall not stop to point out in detail the splendid mechanism of a conveyance deed, but as you have so much dilated upon registration, I refer you to the Report of the Conveyancing Commission, 1850, where you will find that registration of assurances both on the Continent and in England has generally obtained or been aimed at instead of registration of titles.

I have no doubt you will jump to the conclusion that any defects in the Continental system are to be attributed to registration, being by the former instead of by the latter method. But surely this is to see only the black side of the shield, forgetting there may well be a white side; and that the very prevalence of registration of assurances is proof of its superiority over registration of titles.

In England also, since the first commencement in 1660, registration of assurances has always been contemplated, save in the bill of Lord Cairns in 1859—in the act of Lord Westbury, 1862 (which eventually proved to be in fact a registration of assurances), and in the present bill of Lord Cairns.

As you have dwelt so much on the new measure, I may be allowed to make a few observations on its general character, premising that it is perhaps the least imperfect of those wild endeavours to overthrow the noblest system of conveyancing in existence, which at times startle and make the world stand aghast. Just as the revolutionists profit by the experience of past defeats, so that each successive assault on society becomes

more formidable, even so have the fell concoctors of this registration bill shown a wily astuteness, worthy of a better cause, in attempting to cover and strengthen those unprotected flanks, whereby discomfiture has heretofore been courted. But their nefarious councils shall again be scattered on the four winds of heaven.

It is in vain they attempt to avoid the dangers they pretend were the cause of Lord Westbury's act proving a failure. That elaborate and complicated enactment was supposed to be a distinct advance on the bills of 1859; and even Lord St. Leonards, notwithstanding his decided and now fully-justified opposition, preferred the statute to either the bill or the recommendations, pure and simple, of the Royal Commission, 1857. In fact, how were these recommendations contrasted with the Act of 1862? "The result was, that when they had got an estate, they with one hand put on the register an apparent title and with the other hand closed up the register, with an infinite number of inhibitions, caveats and cautions, which must be got rid of before any dealings with it could take place." (Speech of Lord Selborne, then Solicitor-General, 1862, Hans. 167). The great advantage of Lord Westbury's scheme was made to consist in putting a real, not a fictitious, owner on the register. How far that may be true, and how far the present bill departs therefrom, I commend to your consideration.

Time tests all things; and the prediction of Lord St. Leonards has been realized. The Act of 1862 has turned out to be "An Act for the Registration of Assurances *in disguise;*" and so will the measure of 1875, if passed into law—for what else can be the effect of those innumerable caveats, covenants running with the land, charges, incumbrances, fractioning of estates and other entries too numerous to mention? Then it is a delusion to think that practically this, as the former act, will not be for the registration of indefeasible titles alone. It is true the contents of a man's muniments will not be set forth, and that there are careful provisions for preventing inspection of the register save by parties interested; but will any one with either a qualified or possessory title desire to run the danger of that fact being discovered by appearing on the office books in so unsatisfactory a character? Or is it imagined the cautions and other entries will not afford abundant scent to put the quick-nosed busy bodies, who under various excuses will certainly get access to the register, into possession of all their neighbours' affairs, just as much as if the documents were transcribed at length? For the matter of expense—it is six to one and half a dozen to the other. You appear before the registrar—he

refers to the superior courts—you appeal to the Court of Chancery—and eventually to that ghost-like entity—the Supreme Appellate Court—pray where is the saving over an application under the Act of 1862?

There is no general provision for mapping—a defect which, if it renders registration less complete, at any rate saves the country from premature bankruptcy. But it would seem it is within the power of the registrar to require an accompanying map, when it is desired to enter an indefeasible title. Now how much do you think the cost of twenty-seven maps furnished under Lord Westbury's act came too? Why merely to a trifle of 270*l.*—giving an average cost of 10*l.* each—an item, I am mean enough to think, ought not to be altogether overlooked in the "leetle bill" we may have to pay the piper under the latest edition of registration.

From this question of outlay we may naturally pass to the other economic bearings of the bill, the most important of which is the fatal blow aimed at the only profitable safe investment in these days of commercial integrity to the ill-starred capitalist. One might have thought that purse-tricks on a large scale, Tammanay rings, and the delicious music of windings-up, that issues with such sweet unbroken melody from the Court of Chancery, would have satisfied the most insatiable thirst for the commission of fraud and dishonesty. Moderation, however, is a quality fast disappearing from the face of the earth; and so the land must be brought into the already over-gorged market of iniquities to pander a new article of unfair dealing. It used to be said men liked to sink their savings in land, because they knew "*it could not run away whilst they were asleep.*" That pleasing assurance is no longer to minister balmy consolation to the troubled soul. The aim and ambition of the conspirators against our system of conveyancing is to make land as easily and cheaply transferable as stock—in other words, as capable of being used for the violation of a trust, just as if anyone in his senses does not prefer to pay so much more and travel by the ordinary mail, with the strong probability of being killed, to going by the cheap excursion, with the certainty of death! Land when once on the register is clean and free from every claim, save only such claims as are guarded by cautions. The Court of Chancery is bearded within the sanctum sanctorum of its own dominions, for all the equities that might hitherto have been followed into the land are smothered on a transfer other than to a volunteer; and the trembling widow and helpless orphan are to be deprived of that constructive

notice, which heretofore had been so frequently a protection even against a purchaser for valuable consideration.

By sects. 88, 89, when the registered proprietor contemplates a transfer, the registrar is to send notice to all persons who have entered cautions. The notice is directed to the address in the United Kingdom previously given, and is enclosed in an envelope marked externally—"Office of Land Registry." The Postmaster-General is to give directions for the immediate return to the office of these letters in case the persons to whom they are sent no longer retain the given address. If, however, at the expiration of seven days, the letter is not returned, the transfer on the register may be accomplished whether or no the cautioner appears. This is sharp-shooting enough and one might suppose an advertisement in the "leading journal" would do no harm—especially to those unfortunate claimants, who, having entered no caution, ought still to be given one last chance before the bolt is drawn and they are launched into an eternity of lacklands.

The act carefully provides for several standing sources of litigation which, however desirable and beneficial in itself from a humanitarian point of view, will nevertheless meet with the condemnation of the economist. Of course there will be a grand flourish of trumpets in the courts to begin with, but how often you may expect a repetition of the same you will gather from my subsequent remarks. Here I allude en passant to sect. 41, which provides that, on the death of the registered proprietor of freehold land, a person is to be registered in his place by appointment of the registrar (subject to appeal) on the application of any person *interested* in the land. Who are *interested* parties I leave you to guess—only observe the makings of a fine Irish fight, when all the *interested* parties disagree!!

There is certainly no *inconsistency* in the bill—certainly not! Thus, by sect. 73, the superior courts are made courts of reference for questions of law and fact propounded by the registrar; and, by sect. 113, the Court of Chancery is made a court of appeal from the decision of the registrar, from which an ultimate appeal lies to the Supreme Appellate Court (?) and the County Courts are also to be made courts of appeal from the decisions of registrars—with nothing more than *all* the powers of the Court of Chancery, which latter, however, is made the ultimate court of appeal from the County Courts—to flaunt, we may presume, in haughty show before us, the omnipotence of an act of parliament, in transferring all the wisdom and juris-

diction of the higher to the lower tribunal! Then persons not exceeding the prescribed number may be entered as joint proprietors; but no one is to appear on the register as the owner of an undivided share. The Judicature Act (?) seems to have been in view when the highest court of appeal was in contemplation.

Again, there is no *confusion* in the bill—oh dear, no!—certainly not! Thus, by sect. 82, two or more persons may be entered on the register as proprietors, with a note appended that no transfer shall be effected, when by death or otherwise these proprietors are reduced below a certain number, but that the vacant places must first be filled up. Suppose there is no such note and there are originally three persons entered on the register—one of whom dies—is it certain a valid transfer can be effected by the remaining two?

By sect. 42, on the death of a registered proprietor of leaseholds his executor or administrator is to be entered in his stead. Suppose the number of executors or administrators exceeds the prescribed number that may be registered, who then will obtain the honoured place?

The bill is ushered in before the public with the very modest pretension of leaving the law as it is, but still of cheapening and simplifying the mode of transfer. You will very soon perceive the veracity of this pretension is quite in keeping with its humility. Thus some of the warmest advocates of the measure have exhausted themselves in eulogizing the manner in which constructive notice is *swept away!* What becomes of the act* making a mortgage a primary charge upon the land is more easily imagined than described!

Covenants are still to run with the land, but it will go hard with poor Spencer's case when it has to decide the various rights and obligations on an assignment—some of the covenants being entered and some unentered on the register—not to speak of the very simple circumstances that may arise, when one, in a long chain of assignees, happens to register the lease itself.

The separation of surface and minerals in this bill will, perhaps, be as effective as the enactment that, in the absence of an intention to the contrary, all the powers usually conferred should be considered as inserted in every mortgage deed.† Effective or not, however, is not the question; but rather how, in so small a point, there is no deviation from the former law! Then there can be little doubt the law of merger remains intact! for, suppose a registered leasehold and the unregistered fee to

* 17 & 18 Vict. c. 113. † 23 & 24 Vict. c. 145.

centre in the same person—either the entry is not worth the paper it is written on or there is no swallowing up of the lesser in the greater estate!

These are a few examples of the manner in which the bill preserves the law as it was; but, as if such a recommendation were not strong enough, "the glorious uncertainty of the law," so popular amongst the masses, is enshrined in clause 13, which provides that registration shall not be final as to boundaries; so that a registered estate of ten may, on closer examination, turn out to be but an estate of seven acres!

It is very melancholy to reflect that a measure possessing so many advantages and extended at one slap to the whole of England, instead of to a single county, as those stupid and tentative Commissioners advised in 1857, should be doomed to an inoperative existence. The measure, as I have already said, will prove—"an act for the registration of assurances in disguise"—notwithstanding the death-like struggles of its promoters to avoid that catastrophe. You have seen how the register will be crowded; but to give you a more accurate idea:—"the different registered titles with respect to different interests in the same piece of land, that might arise under this bill, which was to make the title to land so simple, were as follows:—Freehold in surface of land, freehold in minerals, freehold in rent, leasehold in surface of land, leasehold in minerals, leasehold in rent—any number of sub-leases in every one of the three before-mentioned particulars:—Estate by curtesy in every one of the before-named freehold interests—Estate by dower in the same—and any number of registered charges on any of the before-mentioned interests. Besides all these registered titles affecting the same piece of land, there might be the unregistered charge by deposit of land certificate on every one of the before-mentioned interests, whether freehold, leasehold, by curtesy, or by dower." (Sp. of Sir F. Goldsmid, 1874, Hans. 220.)

Assume, however, that the bill really proves to be for the registration of title as it professes: still, as I have previously shown, indefeasible titles alone will be registered. Grant that possessory titles will be entered to the utmost degree: yet less than one-third of the land in England and Wales will be within the operation of the bill; for by the report of a parliamentary committee (Sp. of Mr. Law, Hans. 220, p. 1252) it appears that seventy per cent. of all the land within that portion of the United Kingdom, fit for cultivation, is in settlement. Now even where land in settlement may be put on the register, it will not; and the observations of Lord St. Leonards

are as applicable to this as to Lord Westbury's bill. "He was not till this moment aware that the bill invited men settling their estates on marriage to have recourse to the register. Suppose the settlor's attorney to advise him to apply to the court for a title, he would naturally say, "What! do you doubt my title?' 'Oh, no,' would be the reply. 'Then why apply to give me a title when I already have it?' 'Ay,' the attorney says, 'but you may want to sell.' 'To sell!' says the owner, 'I never mean an acre of my estate to be sold from my sons and my sons' sons, to the latest generation, as far as the law will permit it to remain in settlement.'" (Hans. 165, p. 370.)

But, supposing every rood in England and Wales could be registered, the entries would yet not be numerous. There is nothing more hateful to Englishmen than that prying and inquisitorial procedure so much in vogue on the Continent. They would make almost any sacrifice rather than have their affairs thus tampered with and published to all the world. The Saxon temperament will never endure such petty restrictions on liberty—be the gain what it might. Least of all will the people of this country put themselves into the hands of a sub-official like the registrar, whose meddling would be so much more intolerable than the meddling of a person, whose status ranked with that of the judges of the land. "The multiplication of judges was said to be an evil, but a far greater evil was the multiplication of a species of officer, of whom there were too many already, sometimes called registrars and sometimes called commissioners, with powers which very closely resembled the powers of judges, without their weight and responsibility." (Sp. of Lord Cairns, 1862, Hans. 167, p. 249.) Disagreeable enough it sometimes is to open one's affairs to one's solicitor; but the disclosure differs in kind from a revelation to a public official or body, which would be a hundred times more unpleasant.

There yet remains the grand and insuperable objection to the present and all similar bills—they are self-contradictory on the face of them. Their object is to simplify—their effect must be to complicate. One would have thought the spirit of a framer of the Statute of Uses had descended on Lord Westbury as he deplored the existence in the same hereditaments of concurrent legal and equitable estates as the cause and root of the complexities of title. (Hans. 165, p. 254.) Yet what did his act and what does the present bill do? To legal and trust, they *add* registered estates; and thus you have the register, with all its cautions, &c., and, behind the register, all the old dealings with deeds—altered in no other respect, except length

and number of recitals, which, as becomes the dignity of a great piece of legislation, will be considerably enlarged by setting forth in addition to all the former, the various registered transactions!

I may dismiss the subject of the present bill in the words of Mr. O. Morgan:—"For the last 200 years the idea of a perfect land registry had been a sort of philosopher's stone, after which English conveyancers and real property lawyers had been seeking in vain." (Hans. 220, p. 1245.)

You have now my opinion on the Land Transfer Bill, and I shall be curious to observe if you still stick to your favourable impression concerning it. I can hardly believe you will again propound that still wilder scheme of your own—a clean and clear riddance of the whole law of real property. On the contrary, I trust you are now recovered to a healthy state of mind, and let me further trust you will not be, like the ungrateful patient who, once convalescent, forgets his healer, but often have a kindly thought for

Yours with deep respect,

John Doe, Esq. RICHARD ROE.

WHITEACRE,
Manor of Dale.

My dear Roe,

You seem to have been playing at blindman's buff and to have made every other but the right guess. There is one, and, I believe, but one of the assemblage of considerations, adduced in support of the Land Transfer Bill, you have studiously ignored, except indeed with a back-hand slap of abuse. Had that presented itself fairly and received the least reflection, the veil must have been torn from your eyes.

What means that outcry against registration, as though it were a new and untried intruder? Has no provident uncle or thoughtful aunt committed to your trust their nepotal bounties in the 3 per cents? Or is it possible you have never heard of the Merchant Shipping Act? The books of the Bank of England and the register of ships have justly kindled the enthusiasm of our conveyancing reformers. The bank recognizes no trusts but enters as fundholders the name or names of the persons appointed by those, to whose account the

consols are standing, and with the entry the ownership is passed. Still a cestui que trust is not without protection; for, if he has reason to suppose an improper disposition is about to be effected, he may, by application to the Court of Chancery, obtain a distringas or stop order, which will prevent a transfer without the permission of the court. Now the cautions in the Land Transfer Bill will perform the office of a distringas or stop order, whilst the register itself will in clearness, principle, and ease of working approach the bank ledgers and ship registers. By the Merchant Shipping Act, 17 & 18 Vict. c. 104, s. 19, no seagoing vessel shall have the privileges of a British ship unless registered. The property in registered ships is supposed to be divided into sixty-four equal parts, and any person or persons not more than five may be registered as the owner of a part or parts, but not of a fraction thereof, provided the total number of owners does not exceed thirty-two. Every transfer of a registered ship is by bill of sale under seal, according to a prescribed form, which specifies the number and date of registry, the name, build, port of registry, and nature of the ship, with her full description and tonnage. The name of the transferee is entered as owner on the register; and the fact of entry endorsed on the bill of sale. No dealing is recognized unless it appears on the register, which does not admit trusts or any entries, save those of owners and mortgagees.

Can anything be more simple than dealings with stock and ships, and could our reformers, still retaining the antiquated nonsense of real property law, have chosen a better pattern for facilitating the transfer of land? "In five minutes and at an expense less than five shillings, you may make a contract for, and actually transfer, such a ship as the Himalaya or the Great Eastern." "Under this bill any intending purchaser of an estate will have only to say to the vendor, 'I will give you so much money for your estate as soon as you show me that your name is on the register, and that there are no caveats. If there are caveats you must settle with them, and, when you have settled with them, transfer the estate to me, and here is your money.'" (Sp. of Lord Cairns, 1859, Hans. 152, p. 280.) Thus the Land Transfer Bill introduces no new kind of estate as you audaciously declared, but merely an improved mode of conveyance. Nor is the law changed, nor is there confusion, nor is there inconsistency, save in such minutiæ as none but a low order of intelligence would ever notice—minutiæ, which I admit may ruin thousands, in order that millions may be benefited.

Then, if you have done me the honour to peruse my last

letter and are flattering enough to give me credit for the truth of my statements, you will know from the case of Ireland, how much prized is that indefeasible title, which it is one of the chief merits of the Land Transfer Bill to confer. Indeed it was last year stated by a noble lord, that the Duke of Leinster had mentioned to him his idea of passing all his estates through the Landed Estates Court, so impressed was he with the advantages of having a parliamentary title. (Sp. of Lord O'Hagan, Hans. 218, p. 1670.)

Then look at Australia; "In the Australian colonies a system of registration, following as nearly as possible the recommendations contained in the Report of 1857, had been established. It had been introduced into South Australia in 1861, and at later periods into New South Wales, Tasmania, and Victoria; and he found that, within a period of barely nine years, nearly 20,000 titles had been registered, representing property to the amount of something like 13,000,000*l.* or 14,000,000*l.*, whilst the total number of recorded dealings with property approached 90,000. These facts showed, he thought, that a system of registration was not likely to interfere with dealings in land." (Sp. of Sir R. Baggallay, 2nd Read. Land Transfer Bill, Hans. 220.)

I am not at all distressed at that paternal tone, in which you express your solicitude for my mental convalescence, but ever harping on the same thing will stale the best of jokes, and that reiterated compassion has grown out of its original funniness. You never attempt to show, in what the wildness of my scheme of a general extension to all property of the law of personalty consists; and, if I am not mistaken, ipse dixits are especially out of place in the mouth of a lawyer. Though I am but a layman I have a queer weakness for supporting statements that are not self-evident, and whilst the feasibility and expediency of my proposals may from their intuitive character render explanations difficult, they will perhaps afford the most apt illustration of the personal peculiarity just mentioned.

I might cite many countries where the uniformity in the rules governing moveables and immoveables shows that any primordial and radical distinction is a pure matter of accident, but I shall content myself with the Roman Law. The divisions of things are thus set forth:—(1) "Summa itaque rerum divisio in duos articulos deducitur; nam aliæ sunt divini juris, aliæ humani." (2) "Quædam præterea res corporales sunt, quædam incorporales." (3) Quædam res mancipi sunt, quædam nec mancipi. (Gaii, Insts. ii.) Res mancipi are thus enumerated by Ulpian, "Mancipi res sunt prædia in Italico

solo, tam rustica, qualis est fundus, quam urbana, qualis domus; item jura prædiorum rusticorum, velut via, iter, actus, aquæductus; item servi, et quadrupedes quæ dorso collove domantur, velut boves, muli, equi, asini (Ulph. Reg. xix. 1): to which enumeration is to be added—the entire patrimony when a will was made, per æs et libram, (familia sua id est patrimonium (Gaii, Insts. ii. 102). It thus appears that immoveables, whether houses or lands, and rural servitudes (iter, via, actus) on Italian soil were so far distinguished from the general class of moveables as to require the formalities of the mancipatio for their transfer. But even such immoveables and servitudes might be transferred by a cessio in jure of the hæreditas, which, though including res corporales and lands amongst the rest, was itself a res incorporalis. (Gaii, Insts. ii. 34.)

Everyone, however, knows that the distinction of res mancipi and res nec mancipi was altogether fortuitous, those things only being ranked in the former class, which participated in the jus civile and had peculiar value in the eyes of the ancient Roman, when that distinction was irrevocably fixed, so that camels, elephants, and other animalia feræ naturæ, even after taming, were still ranked as res nec mancipi ("ad rem non pertinet, quod hæc animalia etiam collo dorsove domantur," Gaii, Insts. ii. 16); and so were lands of the provinces, unless indeed those to which the jus Italicum was accorded.

The inclusion of beasts of burden—(I had better not say anything about slaves, as you will perhaps pretend that they, like our own villains and niefs, savoured of the realty)—in the same category as lands demonstrates how accidental was the distinction in their transfer from that of the general mass of property. Then with what contempt does Justinian sweep away that barbarous difference and make simple traditio in all cases effective for the conveyance of property:—Antiquæ subtilitatis ludibrium per hanc decisionem expellentes, nullam esse differentiam patimur inter dominos apud quos vel nudum *ex jure Quiritium* nomen vel tantum *in bonis* reperitur; quia nec hujusmodi volumus esse distinctionem nec *ex jure Quiritium* nomen quid nihil ab ænigmate disceptat, nec unquam videtur, nec in rebus apparet, sed vacuum et superfluum verbum, per quod animi juvenum, qui ad primam legum veniunt audientiam, perterriti; ex primis eorum cunabulis inutiles legis antiquæ dispositiones accipiunt: sed sit plenissimus et legitimus quisque dominus, sive servi, sive aliarum rerum ad se pertinentium. (C. 7, 25, Const. Justin.—De nudo jure Quiritium tollendo.)

The jurisprudence of other countries shows there is nothing

in the nature of realty which prevents it being subjected to the same rules as personalty. But did any doubt remain upon the subject that doubt is removed by our own law, which, in the case of chattels real, applies most of the principles governing chattels personal. There! rack your brain until the impossibility of my proposal is demonstrated by as adamantine a chain of argument as the impossibility of motion was once demonstrated by Zeno — my answer is that of Diogenes — Solvitur ambulando! It may not be out of place to state the modes in which property in goods is transferred inter vivos. Those modes are:—1. By gift accompanied with delivery of possession—actual or constructive. 2. By deed of gift without delivery of possession. 3. By bargain and sale—sometimes with, sometimes without delivery of possession—including under this head —barter. 4. By assignment—as of negotiable instruments and bills of lading. 5. By general acts of parliament—as Bankruptcy Act. 6. By entering into certain status—as marriage—(where the husband acquires the wife's choses in possession absolutely and her choses in action sub modo)—partnership, &c. 7. By entry on the books of the bank or on the registers of ships and joint stock companies. 8. By special acts of parliament—royal grants—and letters patent.

Thus there is variety without superfluity in the methods of conveying moveables—applicable with little or no change to the conveying of immoveables. I need not again allude to transfer ex testamento—the uniformity of which established by the Wills Act is, as I before stated, a striking proof of how easily all property may be submitted to the same rules.

This letter concludes with the same prayer as its predecessor —that by all means we may have thorough reform—viz. the adoption of my proposal in making the law governing chattels co-extensive with all property—but, if that cannot be, then such an instalment as is shadowed forth in the Land Transfer Bill.

Est quodam prodire tenus si non datur ultra.

And so in all sincerity believe me

Yours, &c.

JOHN DOE.

Richard Roe, Esq.

BLACKACRE,
Manor of Sale.

My dear Doe,

The cerebral process, to which you have called my attention, will hardly I fear be called into operation by the paradoxes of Eleatics or the tubs of Cynics. Not even the outermost layer of brain tissue can be disturbed by all the concentrated thought I am able to bestow on the rather capacious mare's-nest you have discovered in the justification the law of chattels real furnish, for an extension to immoveables of the rules governing moveables. To a mind that soars in the etherial regions of philosophy, so heavy and mundane an affair as history—above all, history of the barbarous (?) jurisprudence of a small patch, upon the face of an insignificant planet, in one of myriads of solar systems, must be an unmitigated and intolerable bore.

Yet you have yourself to thank for forcing me to inflict this torment, by reminding you that the grandest tenant in Belgravia with a lease of 999 years is, when put into the straight waistcoat of the law, nothing better than an humble bailiff—a degraded care-taker—in fact a sort of private policeman in plain clothes!

You need not cry out—Tempora mutantur et nos mutamur in illis—for, although the term-owner has no longer to weed the gardens and cart the refuse from the demesnes of the freeholder, he stands in precisely the same nihilist position, with regard to the creation and limitation of estates, as of yore. Indeed, if you will be kind enough to remember, you must recall, how you yourself, when showing me over your rock of technicality, pointed out one or two spikes of the range of the rule in Shelley's case, which were crystallized out of this very principle. But why remind you of these facts?—to prove the insignificance of chattels real, and to show you they could not subsist without the substratum of those same freeholds you are so anxious to destroy.

I much regret the mare's-nest should be so easily robbed, seeing there is in reserve so much more expert and athletic a climber, in the fact, that, search the law where you may, you will search in vain for any branch more technical or unknown than that which treats of chattels real! Take the student, who has eaten his dinners for a couple of terms, and he will go through the intricacies of fee simples, entails, estates for life, by the curtesy, or in dower, without falter. Take the barrister of ten years' standing, and you will knock him over on the learning of leaseholds—A. agrees with B. by word of mouth

for the hire of apartments for six months from to-morrow: C. agrees with D. by word of mouth for board, lodging, and keep, for himself, servant and horse for ten years from to-morrow, at the rate of 200*l.* per annum:—an action lies for breach of the second, but not of the first contract.—Suppose two years of a lease to run, and the lessee assigns the residue of the term in writing not under seal—can the assignment be enforced?

But it is not necessary to have recourse to the Statute of Frauds or the Amendment of Property Act, to find difficulties. The difference between an actual demise and an agreement for a lease and the doctrines of notice and fixtures furnish thorny points without number. Thus, "A. agrees to let, and B. agrees to take," may operate as words of present demise; whereas, an agreement by A. to *grant*, and B. to *take a lease*, for a certain term, at a fixed rent, is *per se* only a contract for a future demise. Again—the acceptance of rent, quà rent, after the expiration of a notice to quit, may amount to a waiver of the notice; but a mere demand of rent, accruing subsequent to that expiration, is not of itself a waiver. A quarter's notice ending at any quarter after the first year will suffice when the demise is—"for one year, and then to continue tenant afterwards, and quit at a quarter's notice"—but, when a house is let "from year to year, to quit at a quarter's notice," the notice must expire at the period of the year at which the tenancy commenced.

These are petty waifs and strays that float on the surface and superficial bosom of the law of chattels real—waifs and strays that might be found in the common-place book of any embryo lawyer, yet I feel confident they are sufficient, without recurring to any really nice and difficult distinctions on this subject, to drag you down from that high unanswerable dialectic, which was to deal my poor nervous system so serious a shock.

With this assurance I may proceed to the other portions of your epistle—with the expectation that what I have yet to say will meet with perusal. I was under the impression it was a gross outrage upon philosophical reasoning, to attempt to draw an inference from the sequences in one country to those which might be looked for in another. But let that pass. I am ready to meet you in that fallacious method of induction, by showing there are quite as many countries which do as do not, maintain a distinction in the rules, which govern moveables and immoveables, respectively.

But I shall follow your own example and allude only to the Roman law, which you flaunt so haughtily in my teeth as though it declared in stentorian tones, that the highest develop-

ment of jurisprudence demanded the same law for property of every kind and description, and that the enactment of Justinian was a sample of that legislative interference, which is requisite to the perfecting of every legal system. You have stated that lands on Italian soil were res mancipi, and I am perfectly willing to admit the accidental character of such a peculiarity; as, indeed, the successive designations given to property itself sufficiently manifest. "Le droit de propriété se dépouille de ses anciennes appellations quiritaires; il commence à prendre le nom plus général, plus philosophique de proprietas, qui désigne que la chose nous est appropriée. Ainsi, la philologie, dans les trois noms successifs qui ont été donnés à ce droit, retrouve l'histoire des vicissitudes et des transformations de la société Romaine. *Mancipium*, dans les temps primitifs, de *manu capere*, lorsque la guerre, la lance, sont le moyen d'acquérir par excellence. *Dominium*, plus tard: c'est la maison (*domus*) qui est propriétaire, toutes les individualités s'absorbent dans la personne du chef. Enfin, *proprietas:* la personnalité de chacun, même des fils de famille, est constituée; ils ont une propriété à eux; ce n'est plus la maison seulement, c'est chaque individu qui peut être propriétaire." (Explication Historique des Instituts de l'Empereur Justinien, par M. Ortolan, Tom. Prem., Histoire et Généralisation, p. 360, 8th ed.) All this is very true; and I only wish you had pursued the matter further, and told me how the agro Romano preserves to this day the boundaries traced out by Servius Tullius, and marking the original domain to which the jus civile extended; how that domain was enlarged to the whole of Italy by the result of the Social War, B. C. 90; how all the rest of the empire, with the exception of those places to which the jus Italicum was granted, belonged as ager publicus to the state, and, saving the agri quæstorii and assignati, was therefore unsusceptible of dominium ex jure Quiritium or the formalities of the mancipation. We must look to the ager publicus—to the provinces, if we would institute any comparison between the holding of lands in Roman and English law, inasmuch as they were not subject to the artificial jus civile of ancient times. You know that the lands in the provinces were agri occupatorii, vectigales, or subscivi, according as they were tenanted—by a mere occupant, paying rent and sometimes without any rent—by an emphyteuta, to whom they were farmed out, and who paid rent to the public treasury—or were retained by the state after the distribution of the conquered territory. These latter lands, and sometimes, too, even the allotted portions, were invaded by patrician and powerful plebeian families, and *possessed* with all the benefits

of ownership. Thus, they were transmitted as inheritances and were acquirable under the edicts of the prætors by præscriptiones longinqui temporis of ten and twenty years, according as the true owners were present in the same province or absent, respectively—a rule which Justinian confirmed and extended by making it applicable to Italian as well as provincial soil, at the same time abolishing the biennial usucapion of the Twelve Tables—and, as to moveables, substituting for a one year's a three years' usucapion. (Insts. ii. tit. 6.) Those possessions resembled, in not being proprietary, our own estates, none of which are allodial (Co. Litt. 1 b), but, in most other respects, they widely differed. Need I unfold the deeds of injustice with which their history is so sadly associated, and which aroused the indignant passion of Stolo, the Gracchi, and so many other heroes, who fell as martyrs in the cause of fair play? By the Lex Licinia, De modo agrorum, 366 B. C., no one was to possess more than 500 jugera of land (ne quis amplius quam quingenta agri jugera possideret). With the exception of the promoter, who, for breaking his own law, was fined 1,000 asses, very few persons were prosecuted for violation of this measure, which consequently proved a dead letter. It however furnished the model for the Lex Sempronia, 132 B. C., in which Tib. Gracchus proposed that no citizen should possess more than 500 jugera, plus 250 for each child. The lands that would be surrendered in consequence were to be distributed amongst the poor citizens, who were to pay therefor an annual rent to the state. With the massacre of its author, this measure also proved abortive; and so did most of the other agrarian laws down to Cæsar's Lex Julia, 63 B. C., which distributed the public lands of the Campaigna amongst poor citizens who had three or more children—a distribution of which about 20,000 heads of families availed themselves.

But all the agrarian laws that could have been devised would have been powerless for good, once the lawless system of paying the soldiery in land instead of in money, came into practice. How pathetically does Virgil describe the rapacity with which the territory of Mantua was thus allotted in B. C. 40, pursuant to the compact of the triumviri, Mark Antony, Lepidus and Cæsar Octavianus!—

> En, unquam patrios longo post tempore fines
> Pauperis et tugurî congestum cespite culmen,
> Post aliquot, mea regna videns, mirabor aristas?
> Impius hæc tam culta novalia miles habebit?
> Barbarus has segetes? en, quò discordia cives
> Perduxit miseros! en, queîs consevimus agros!
>
> Ecl. i. 68.

Few, however, were the owners who, like the poet, resided on their property. For ages, the simplicity and rigour of a Cincinnatus had been unknown, and the severity of Cato and the other stoics served but to bring out in stronger relief the prevailing luxury and waste. General absenteeism—always disastrous to a country—became utterly destructive when the cultivation of the soil was committed to the unfortunate beings whom capture or birth had reduced to slavery. Labour stimulated by the lash was attended with its usual result—unproductiveness—an evil which was indefinitely increased by a general abandonment of, or expulsion from, tillage of the free population. In vain were larger and larger troops of human beings driven to servile toil. Nature resented the outrage offered to her noblest work, and visited—with the chastisement of a constantly-diminishing return—man's hateful greed that enthralled his fellow-man. Hence arose the necessity for modifying the condition of the labourer, by giving him that interest in the fruits of his exertions which would partly secure those vigorous efforts that are the attributes of freedom and independence alone. Territorial serfdom replaced personal servitude:—"L'esclavage, tel que l'ont connu les anciens Romains, a commencé sa transformation; le servage a pris naissance: à côté de l'asservissement de l'homme à l'homme vient se placer l'asservissement de l'homme à la terre." (Histoire et Généralisation, Ortolan, i. 386, 8th ed.) The new class of workmen (the originals of our ancient villains) are known under the names Coloni or Agricolæ, of which there were two kinds—1. The Servi Censiti, Adscripticii, or Tributarii. 2. The Inquilini or Coloni Liberi. The feature in common between these two kinds was, that both were equally bound to reside on the soil they cultivated—were irremovable by their masters—and, on a sale of the lands, passed as an appurtenance to the purchaser. The condition of the servi censiti—so called from being inscribed on the census as servi coloni, and rated for the payment of a personal impost or capitation to the imperial exchequer—approximated to actual slavery. These coloni were, either themselves or their ancestors, slaves. All they had, even their peculium, belonged to their masters. Still they and their families were allowed to occupy the land to which they were attached, and live on its products, yielding their masters a rent, either in kind or in money. The condition of the inquilini, on the other hand, approximated that of freedom. They were, either themselves or their ancestors, free—they might have property of their own—as well in immoveables as in moveables, poverty and wretchedness having induced them

to descend to a status which, though humbler, afforded, at least, subsistence. These coloni were also entered on the census for a personal impost and for the ordinary tax, if proprietors of an immoveable. Although owners in their own right, they had still to pay an annual rent (canon, redditus) to their masters in kind or in money which it was forbidden to raise. The coloni or agricolæ had been introduced shortly before the time of Constantine.

Now why have I been thus particular in stating all these details?—to prove, that Roman jurisprudence can be no guide or model on the subject of land—which, whether during the Republic or during the Empire, was under artificial ownership, artificial cultivation, in a word, under so many artificial conditions, that its transfer, in being effected as that of other property, may also rightly be deemed to have been artificial and not such as the genius of the system would have struck out in a state of natural competition and arm's-length dealing. I shall not revert to the entirely different circumstances which render the argument drawn from the Roman law equally fallacious with the illustrations you would derive from the jurisprudence of other countries.

There is one thing, however, I cannot pass over—the Empire was like America and Australia in possessing a boundless thinly occupied, or, to a great extent altogether unoccupied, expanse—a fact, which shatters and shivers to a thousand pieces any supposed connexion between the rules, which should govern those vast areas and the limited surface of England. You know, sir, as well as I do, that in the United Kingdom land is a monopolized article, and yet you have dared to hazard a comparison of the registration and uniformity in the transfer of property obtaining in countries, where land is a commodity in such general supply, that, amongst other significant facts, the great problem of emigration is to confine the immigrants to soil already subjected to cultivation, so as to obtain the combination that will render labour most productive, instead of permitting the new comers to set up as landowners for themselves—so cheap and easy is it to become a proprietor. The boldness is on a par with the coolness of the affront in striving to gain your point by an ignorant oversight on my part—an oversight, too, the commission of which would vainly task crassness the most gross!

You urge the example of Australia as furnishing a strong argument in favour of registration of title in England; but no inference could be less warranted. In the case of the former, as I have just said, there is that abundance of land, which

indefinitely lowers its value; and the cheapness of the article makes it a bad speculation, to go to the expense of picking flaws in disputable titles. Consequently, a conveyance need not be hedged round with all that care and circumspection, without which no man's holding would be safe in this country. Again, to general differences as in other countries, Australia superadds the very great difference of being a new country. Hence, there are not those historical traditions and longstanding associations, which in an old country like England clog any new movement set on foot. Moreover, registration is compulsory in Australia, so that in course of time there can be but one system of transfer. Not so under the registration bill proposed for England; and, to be sure, if we are to choose the lesser of two evils, it is no doubt better to have the voluntary system here. It is better, I say, because compulsion would be utterly intolerable with us and legal ingenuity would be taxed to devise modes of avoiding the obnoxious tyranny. Yet no measure of registration can be eventually beneficial, unless made compulsory, inasmuch as it will otherwise always lead to complexity by adding another to the various methods of transfer. The bill of last session proposed universal compulsion, except for estates sold at a price not exceeding 300*l.*—an exception, which it was truly observed "clearly signified and could only signify, that the new method of making out titles would be more expensive than the old." (Sp. of Sir F. Goldsmid, Hans. 220.)

Thus, the success of registration in Australia affords no ground for expecting similar success in England. Nor do the operations of the Landed Estates Court in Ireland yield any better hope. In the first place, that tribunal is judicial in the fullest sense of the word; whereas the Land Registry will be a sort of mongrel—half judicial—half official and mechanical. The promoter of the Land Transfer Bill is apparently now, as in 1859, convinced that a "court" is preferable to a "registry;" yet, in order to utilize the unoccupied staff constituted under Lord Westbury's Act, the fate, of what is put forward as a great measure, is to be jeopardized!

In the next place, the success in Ireland is greatly to be attributed to the large number of estates so encumbered and loaded with such complex burdens, that the court was a "tabula in naufragio," resort to which could not make matters worse and might possibly make them better. But in England, though most land is in mortgage, there is no such complication as would render recourse to the registry office equally general, and, if not general, registration can never be advantageously

effective. Then, in Ireland, there is the Ordnance Survey, and the General Valuation, and the long-established Registry of Deeds—three powerful engines in facilitating the working of the Landed Estates Court. England lacks these engines; nor will the tithe maps, being on no general plan, be much of a substitute. Hence her registration of title starts without those aids, which have been so auxiliary in the sister isle.

It is not necessary to comment on the table you have given of the modes in which personal property is transferred. Evidently most are in use with regard to realty under certain modifications, and those modifications are obviously suggested by the different nature of immoveables. Certainly, were you not so inconsistent, one might be surprised to see you mentioning transfer of personalty by delivery of possession, just as if there could be any delivery of land in the same manner, except by symbol; and thus we are driven to feoffment and livery of seisin—that ancient mode of conveyance branded in a previous letter with the mark of your reprobation!

I have now gone through the various positions advanced in your last note, with the exception of the first, which, though thrown to the front as apparently an impregnable outpost, is far the weakest and most untenable of all. You have gloated over the registration of stock and ships, believing its success to be the prototype and precursor of the success, which is to attend the registration of title to land. Really it is astonishing how curious an answer would sometimes have to be given to the pert inquiry, "What's in a name?" "Magic," in the present instance is one of the most prominent ingredients—for how else could such wondrous confusion have been wrought in your mind, by the term "registration?" Can you seriously think that shares in ships, stock, or companies, have anything in the wide world to do with land? You are aware that such property is personal; but have you adverted to the fact, that it is not of corporeal, but of incorporeal, nature? for this is the kernel of the whole matter. The truth is shares are susceptible of title registration, for the very reason, that they are—to borrow the language of the commentators of the civil law—res fungibiles; and in like manner susceptible of such registration are all other things, quæ pondere, numero, mensurave constant. But with this exception corporeal chattels are incapable of such registration equally with land, and wherefore? because their existence is individualized—because one horse will not stand for another horse, as one barrel of oil will stand for another barrel of oil. The distinction of things determined in specie and in genere respectively is found in our own (e. g., bargain and sale of

individual objects or of things sold by bulk, measure, &c.) as well as in the Roman jurisprudence, and, no doubt, finds a place in the jurisprudence of every country, being based on a distinction nature herself supplies. Fungibile things are described in the Institutes (ii. tit. 4, s. 2), as, res quæ usu consumuntur—or, as Cicero and Ulpian have it, res quæ in abusu continentur (Top. 50; Ulp. Reg. 24, s. 27)—whereas things not fungibile, are—res, quarum salva substantia utendifruendi potest esse facultas (Ulp. Reg. 24, s. 26). The real contracts—mutuum and commodatum—bring out the opposed characters in strong relief. Both were contracts of loan, but the obligations that arose out of each transaction were very different, as appears by the following descriptions: "Re contrahitur obligatio, veluti mutuidatione. Mutui autem datio in iis rebus consistit quæ pondere, numero, mensurave constant, veluti vino, oleo, frumento, pecunia numerata, ære, argento, auro; quas res aut numerando, aut metiendo, aut adpendendo in hoc damus ut accipientium fiant. Et quandoque nobis non eædem res, sed aliæ ejusdem naturæ et qualitatis redduntur: unde etiam mutuum appellatum est, quia ita a me tibi datur, ut *ex meo tuum* fiat. Et ex eo contractu nascitur actio quæ vocatur condictio.

"Item is cui res aliqua utenda datur, id est commodatur, re obligatur et tenetur commodati actione. Sed is ab eo qui mutuum accepit, longe distat; namque non ita res datur ut ejus fiat, et ob id de ea re ipsa restituenda tenetur. Et is quidem qui mutuum accepit, si quolibet fortuito casu amiserit quod accepit, veluti incendio, ruina, naufragio, aut latronum hostiumve incursu, nihilominus obligatus permanet. At is qui utendum accepit, sane quidam exactam diligentiam custodiendæ rei præstare jubetur; nec sufficit ei tantam diligentiam adhibuisse, quantam in suis rebus adhibere solitus est, si modo alius diligentior poterit eam rem custodire; sed propter majorem vim majoresve casus non tenetur, si modo non hujus ipsius culpa in casus intervenerit. Alioquin, si id quod tibi commodatum est peregre tecum ferre malueris, et, vel incursu hostium prædonumve, vel naufragio, amiseris, dubium non est quin de restituenda ea re tenearis. Commodata autem res tunc proprie intelligitur, si, nulla mercede accepta vel constituta, res tibi utenda data est; alioquin, mercede interveniente, locatus tibi usus rei videtur, gratuitum enim debet esse commodatum." (Insts. iii. tit. 14, s. 2.)

I am quite aware that the intention of the parties or circumstances might transform a res fungibilis into a res non fungibilis; and conversely, as in the case of money in a chest put by Paul:—"Si certos nummos, puta qui in arca sint, stipulatus sim

et hi sine culpa promissoris perierint, nihil nobis debetur." (Dig. vi. s. 1, N. 37.) So, in the case put by Ulpian of a legacy:—"Talis scriptura: quas pecunias legavi, quibus dies adpositus non est, eas heres meus annua bima trima die dato, ad corpora legata non pertinet, sed ad ea quæ pondere, numero, mensura continentur. . . . Item si legetur pecunia quæ in arca est vel vinum quod in apothecis est, dicendum est cessare clausulam, quoniam quotiens species legetur cessare diximus." (Dig. xxx. 30.) On the other hand, even an immoveable might become a res fungibilis, as so many acres of land—but here, as in the case of money, an additional circumstance has to be added on, the land must be *eâdem qualitate et quantitate* as the money must be kept in the coffer, and the necessity of this distinguishing circumstance proves that the difference between things determined generically and specifically, is physical and radical, and that Paul's language—"In genere suo magis recipiunt functionem per solutionem, quam specie" (Dig. xii. 12), as well as the definition of the commentators—"Quarum una vice alterius fungitur"—are only applicable to things, which in their nature are substitutional.

To all this you will object with your usual shallowness—"Oh! but a ship or a railway is an individualized entity in all conscience; yet registration is as successful with them as with consols!" Poor dreamer! is it not manifest that registration in the case of ships and companies is successful, because, and because only, the shares are res fungibiles? Do you suppose that, if instead of distributing the value of a ship into aliquot parts, you were to divide the ship itself into the same number of aliquot parts of equal value, and assign and register the assignees of these latter as owners of specific portions—do you suppose, I say, that the registration would be possible, or if possible, advantageous?

And is not this, or rather something more difficult, precisely what is contemplated in the bill as to the registration of title to land? May it not be said of the present scheme, as it was said of Lord Westbury's Act:—"There was nothing tangible about it—nothing but a piece of paper. One estate was not quite the same as another, but 1,000*l.* stock was as good as another 1,000*l.* stock." (Sp. of Ld. St. Leonards, Hans. 152, p. 681.)

The guilt of the plotters and abettors of these nefarious measures becomes of a deeper dye when it is remembered they act throughout with consummate malice aforethought, for, it may reasonably be presumed, they have all heard of the Court of Chaucery, and of the common doctrine that specific performance will not be enforced for the transfer of stock, for this

very reason, that on payment of the differences a complaining party is in no way damnified, inasmuch as he can go into the market the next day and contract for a subject-matter in all respects similar without disadvantage. Thus are the conspirators put into the dock and convicted of an aggravated assault upon our revered system of conveyancing—an assault as heinous—would it were as punishable! as your cowardly attempt to garrotte the whole law of real property!

The fungible nature of stock is from the foregoing investigation abundantly manifest, and so of shares in ships; the non-fungible nature of land is equally manifest; thus the fundamentum relationis between the existing and proposed registration breaks down; and with it crumbles to powder that unsightly bridge of analogical argument, by which you thought to span the impassable gulf, which divides experienced and established success from unrealized and groundless expectation.

You have spoken of the omnipotence of the law, and who will contest the point? The law, I own, is omnipotent; but, I couple the admission with a distinguo. An act of parliament may command a sluice to be put up across a small stream; or it may command the inhabitants on a particular coast to prevent the tide from ebbing and flowing. A duty is imposed in each case—a violation of which is legally punishable. In the imposition of the obligations the law is equally omnipotent but utterly impotent to enforce the performance of its second mandate. So the law may order that immoveables shall be treated as moveables:—in the command there is omnipotence—but what in the execution? Let the 7 & 8 Vict. c. 76 be a warning against playing with the omnipotence of the law. That statute amongst other omnipotent feats declared "that a 'contingent remainder should be an executory devise!' or, in the sarcastic words of the late Lord Campbell, C., 'that a square should be a circle!'" (Warren's Law Studies, vol. ii. p. 1215, 3rd ed.)

We all know with what hot haste the 8 & 9 Vict. c. 106, followed on the heels of the previous act to undo the mischief thereunder done or impending. So, unless you want to have another ridiculous exhibition of imbecility, abandon this phantom of registration; seek not to impose on objects qualities their nature rejects; aim not at the boasted uniformity of the doctrinaire—in a word (for you will not improve it) be satisfied with the creation, as it is, in the benign and practical spirit of

Yours most contentedly,

John Doe, Esq. RICHARD ROE.

WHITEACRE,
Manor of Dale.

Dear Roe,

Perhaps there is no more painful sight than the spectacle of faculties misapplied and powers misused. You have your share of gifts—paltry, indeed, though the modicum be! Yet, by a life of continuous plodding and unremitting industry, you might have risen to the coarser conceptions of justice and honesty. Unfortunately your days and, for that matter, your nights too, have been devoted to the acquisition of the art and mystery of legal legerdemain, and so deeply has this pursuit eaten into the very vitals of your intellectual being, that you are utterly incapable of distinguishing between right and wrong —truth and falsehood. So long as I take my stand on merely legal ground and urge from a legal point of view the obvious dictates of common sense and expediency, I might as well be speaking to you in high Dutch, for, no matter what I say, you are always ready to give a meaningless answer; by an unenviable sleight of hand you evade or repulse every attack. But your juristic coat of mail shall no longer protect, for I shall now give battle with the resistless engines of political economy, which will drive you in confusion from the redoubts a depraved sophistry has hitherto enabled you to hold.

First, then, of that topic we spoke of in an earlier portion of our correspondence: "There are two arguments of an economical character, which are urged in favour of *primogeniture.* One is, the stimulus applied to the industry and ambition of younger children, by leaving them to be the architects of their own fortunes. This argument was put by Dr. Johnson in a manner more forcible than complimentary to an hereditary aristocracy, when he said, by way of recommendation of primogeniture, that it 'makes but one fool in a family.' It is curious that a defender of aristocratic institutions should be the person to assert that to inherit such a fortune as takes away any necessity for exertion, is generally fatal to activity and strength of mind: in the present state of education, however, the proposition, with some allowance for exaggeration, may be admitted to be true. But whatever force there is in the argument, counts in favour of limiting the eldest, as well as all the other children, to a mere provision, and dispensing with even the 'one fool' whom Dr. Johnson was willing to tolerate. If unearned riches are so pernicious to the character, one does not see why, in order to withhold the poison from the junior members of a family, there should be no way but to unite all

their separate potions, and administer them in the largest possible dose to one selected victim. It cannot be necessary to inflict this great evil on the eldest son, for want of knowing what else to do with a large fortune.

" The other economical argument in favour of primogeniture, has special reference to landed property. It is contended, that the habit of dividing inheritances equally, or with an approach to equality among the children, promotes the subdivision of land into portions too small to admit of being cultivated in an advantageous manner. This argument, eternally reproduced, has again and again been refuted by English and continental writers. It proceeds on a supposition entirely at variance with that on which all the theorems of political economy are grounded. It assumes that mankind in general will habitually act in a manner opposed to their immediate and obvious pecuniary interest. For the division of the inheritance does not necessarily imply division of the land; which may be held in common, as is not unfrequently the case in France and Belgium; or may become the property of one of the co-heirs, being charged with the shares of the others by way of mortgage; or they may sell it outright and divide the proceeds. When the division of land would diminish its productive power, it is the direct interest of the heirs to adopt some one of these arrangements."

Thus is the banefulness of primogeniture shown up in its true colours, nor are entails a less grievous misfortune:—" The economical evils arising from this disposition of property were partly of the same kind, partly different, but on the whole greater than those arising from primogeniture alone. The possessor could not now ruin his successors, but he could still ruin himself: he was not at all more likely than in the former case to have the means of improving the property, while, even if he had, he was still less likely to employ them for that purpose, when the benefit was to accrue to a person whom the entail made independent of him, while he had probably younger children to provide for, in whose favour he could not now charge the estate . . . . It may be added that the heir of an entail, being assured of succeeding to the family property, however undeserving of it, and being aware of this from his earliest years, has much more than the ordinary chances of growing up idle, dissipated, and profligate." *

One of the worst consequences of both primogeniture and entails is to restrict land from being employed in the most highly productive manner. This restriction on free trading in

* J. S. Mill, Pol. Ec., bk. v. c. 9.

land is of course irresistibly strengthened by a monstrous mode of transfer—any change of which must be hailed as a great economic blessing.

Were a greater production of wealth the only economic result that might be looked for from an abolition of primogeniture, entails, and expensive wearisome conveyances, there would be no great reason to rejoice. As it is, wastes are reclaimed—bogs and fens brought under cultivation—sterile ground made fertile—and thus an enormous addition is given to the means of subsistence. But is this result any advantage per se? If we listen to the glowing periods of the statesman's or M.P.'s stump oratory, or to the roarings of public platforms, or to the budget-eulogiums of the press, we have the affirmative dinned into our ears unto deafness. Yet how much is the pauper list reduced? how far is the struggle for existence mitigated? in what respect is labour softened? Statistics and history show, that the almost uniform result of a fall in the price of corn has hitherto been to stimulate marriages amongst the working classes, and thus, within a brief period, the advantage, heralded forth with such pomp, turns out to be a mere multiplication of those who are consigned to drudgery for the rest of their days; and if no improvement in agriculture intervenes, an eventual increase of rent to the already swollen pockets of the landlords. Philanthropy—charity—poor law—all are powerless to raise the condition of the lowest strata in society, without the diffusion of prudence and the permanent elevation of the standard of comfort amongst those strata—as powerless as the most profuse money alms is to buy bread in an isolated famine-stricken town, if the rich donors will not reduce their own consumption. With, however, the destruction of primogeniture, entails and a cumbrous system of transfer, land would become a really merchantable article; and, though its value would from that very fact unquestionably rise, the cheapness of conveyancing would render profitable sales in small lots, which would be within the reach of the thrifty labourer, and thus would be laid the foundation for peasant proprietorships—in other words for the restoration of that famed yeomanry "who were vaunted as the glory of England while they existed"—and with them for the introduction of forethought and providence amongst the lower orders. In this way we perceive how increased productiveness would become a real blessing, and how desirable it is to strike off from the soil those deadening shackles, which immoveably impede the progress of improvement.

I presume you will take me to task for so readily disposing of the vexed question as to the relative merits of the *petite* and

the *grande culture.* I presume also you will dispute the moral benefits attributed to small ownerships. You will doubtless insist that the general axiom on the Continent in favour of small proprietorships is of little value, because abroad there are no examples of successful cultivation of extensive properties. "But the argument admits of being retorted; for if the Continent knows little, by experience, of cultivation on a large scale and by large capital, the generality of English writers are no better acquainted practically with peasant proprietors and have almost always the most erroneous ideas of their social condition and mode of life." (J. S. Mill, Principles of Pol. Ec., bk. ii. ch. 6.) It is easy, however, to prove the economical and moral advantages of small proprietorships.

"'It is especially Switzerland,' says M. de Sismondi, 'which should be traversed and studied to judge of the happiness of peasant proprietors. It is from Switzerland we learn that agriculture, practised by the very persons who enjoy its fruits, suffices to procure great comfort for a very numerous population; a great independence of character, arising from independence of position; a great commerce of consumption, the result of the easy circumstances of all the inhabitants, even in a country whose climate is rude, whose soil is but moderately fertile, and where late frosts and inconstancy of seasons often blight the hopes of the cultivator. . . . Wherever we find peasant proprietors, we also find the comfort, security, confidence in the future, and independence, which assure at once happiness and virtue. . . . The peasant proprietor is of all cultivators the one who gets most from the soil, for he is the one who thinks most of the future, and who has been most instructed by experience. He is also the one who employs the human powers to most advantage, because dividing his occupations among all the members of his family, he reserves some for every day of the year, so that nobody is ever out of work.' . . .

"'Minute labour on small portions of arable ground gives evidently, in equal soils and climate, a superior productiveness, where these small portions belong in property as in Flanders, Holland, Friesland, and Ditmarsch in Holstein, to the farmer. It is not pretended by our agricultural writers, that our large farmers, even in Berwickshire, Roxburghshire, or the Lothians, approach to the garden-like cultivation, attention to manures, drainage, and clean state of the land, or in productiveness from a small space of soil not originally rich, which distinguish the the small farmers of Flanders, or their system.'

"But the most decisive example in opposition to the English

prejudice against cultivation by peasant proprietors is the case of Belgium. The soil is originally one of the worst in Europe. 'The provinces,' says Mr. M'Culloch, 'of W. and E. Flanders, and Hainault, form a far-stretching plain, of which the luxuriant vegetation indicates the indefatigable care and labour bestowed upon its cultivation; for the natural soil consists almost wholly of barren sand, and its great fertility is entirely the result of very skilful management and judicious application of manures.'

"It is from France that impressions unfavourable to peasant proprietors are generally drawn. . . An authority, on this point, not to be disputed, is Arthur Young, the inveterate enemy of small farms, the coryphæus of the modern English school of agriculturists; who yet travelling over nearly the whole of France, in 1787, 1788, 1789, when he finds remarkable excellence of cultivation, never hesitates to ascribe it to peasant property. . . 'Give a man the secure possession of a bleak rock, and he will turn it into a garden; give him a nine years' lease of a garden, and he will convert it into a desert.'" . .*

"The mental faculties will be most developed where they are most exercised; and what gives more exercise to them than having a multitude of interests, none of which can be neglected, and which can be provided for only by varied effects of will and intelligence? Some of the disparagers of small properties lay great stress on the cares and anxieties which beset the peasant proprietor of the Rhineland and Flanders. It is precisely these cares and anxieties which tend to make him a superior being to an English day labourer. . . It is not on the intelligence alone that the situation of a peasant proprietor exercises an imposing influence. It is no less propitious to the moral virtues of prudence, temperance and self-control. Day labourers, where the labouring class mainly consists of them, are usually improvident . . . . the tendency of peasant proprietors and of those who hope to become proprietors is to the contrary extreme." . .†

I suppose you will scarcely have the hardihood to resist directly the force of these observations in favour of peasant proprietors; but you may seek to elude their effect by the contention, that England is not an agricultural, but a manufacturing country; that it is the spinning-jenny and steam-engine, not the plough and sickle, that are our bread-winners; and that, therefore, an improvement in the status of the tillers of the soil can have very little power in ameliorating the posi-

* J. S. Mill, Pol. Ec., bk. ii. c. 6. † Ib. c. 7.

tion of labourers at large. This conclusion involves a fallacy, similar to that contained in the objection to Ricardo's theory of rent—viz. that there is no farming, which does not yield a higher than the ordinary rate of profit, and that the excess thereof over the ordinary rate enables rent to be paid even for the worst land under cultivation:—the answer to which objection is, that farming is as agreeable as any other industry, and that consequently persons will engage therein so long as they can obtain the ordinary rate of profit, and thus by descending to the "margin of cultivation" fixed by the given state of population, there will be no surplus for the landlord. So peasant proprietorships, being once established and found as paying as a mechanic's employment, will draw numbers of artisans to that kind of life—and this result, increasing the numbers of the provident class and diminishing those of skilled hands, will reinforce the ranks and example of the prudent, and, in lessening the competition of labour, will raise the wages of their late fellow-workmen, and in the ultimate result raise wages generally, since by the hypothesis there is an absolute diminution of the labouring class, by the transition of a portion of its members to the class of proprietors working on their own account. Hence, it appears that the establishment of small proprietors will be a blessing to the whole labouring class, the revivification of which will proceed from the lowest, and gradually be diffused through all its other grades, just as warmth is spread from the extremities to all other parts of the body.

The desirability of small proprietorships and of enfranchising land from the slavery of primogeniture, entails, and expensive transfer, is loudly called for by the voice of justice. You have zealously insisted on a radical difference between moveables and immoveables for the purposes of law—that I deny—but that there is a fundamental difference for the purposes of economy is of course apparent to every one. What requires to be inculcated is the moral consequences which flow from that difference. "No man made the land. It is the original inheritance of the whole species. Its appropriation is wholly a question of general expediency. When private property in land is not expedient, it is unjust. It is no hardship to any one to be excluded from what others have produced: they were not bound to produce it for his use, and he loses nothing by not sharing in what otherwise would not have existed at all. But it is some hardship to be born into the world and to find all Nature's gifts previously engrossed, and no place left for the new comer. To reconcile people to this, after they have once

admitted into their minds the idea that any moral rights belong to them as human beings, it will always be necessary to convince them that the exclusive appropriation is good for mankind on the whole, themselves included." (J. S. Mill, Pol. Ec., bk. ii. c. 2.)

The "sacredness of property," therefore, cannot be applied in the same sense to immoveables as to moveables; and if property in land is to be at all allowed to private individuals instead of a general appropriation by the state with compensation for all existing interests, each member of the community should have a chance of becoming an owner of the coveted article. By the existing law, however, the booty is practically secured to a few idle drones, of whom it may be said, as was several years ago said of the owners of Irish estates, that "the greatest burthen on land is the landlord." The landowner reaps where he has not sowed, and this privilege to be reconcilable with justice should, by being shared by as many persons as possible, be stripped of its exceptional character. That to the landlords and to the landlords alone of any class in the state belongs such a privilege will be admitted without controversy, nor do I intend to trouble you with enforcing so well known a truth.

I have now hinted at those economic considerations, which demand an abolition of the law of real property, or, at least, of so much thereof as can be wrung from a Conservative government. These arguments are not to be turned aside by any kind of legal shuffling, and thus all your tricks and devices are brought to naught. After all this waste of correspondence may I not regret the tardiness of your conversion to my views as Achilles regretted the tardiness of the reconciliation with Agamemnon—

> "Ἀτρείδη, ἦ ἄρ τι τόδ' ἀμφοτέροισιν ἄρειον
> Ἔπλετο, σοὶ καὶ ἐμοί, ὅτε νῶϊ περ ἀχνυμένω κῆρ
> Θυμοβόρῳ ἔριδι μενεήναμεν εἵνεκα κούρης;"
>
> Il. xix. 6.

But no matter, you are now become my fellow-combatant in the war against those mischievous principles you before sustained. One brave charge and the day is ours—yours—civilization's, and that of

Your gallant commander,

JOHN DOE.

Richard Roe, Esq.

BLACKACRE,
Manor of Sale.

Dear Doe,

Do not alarm yourself about a wasteful correspondence, unless you mean that useless series of letters you yourself have penned. For my part I am glad to have an opportunity of confirming, economically, those principles which I have already shown to be, legally, unassailable. Nor will you catch me whining out like the craven son of Atreus:—

> ——————————— ἐγὼ δ' οὐκ αἴτιός εἰμι
> Ἀλλὰ Ζεὺς καὶ Μοῖρα καὶ ἠεροφοῖτις Ἐρινύς
> Οἵτε μοι εἰν ἀγορῇ φρεσὶν ἔμβαλον ἄγριον ἄτην
> Ἤματι τῷ ὅτ' Ἀχιλλῆος γέρας αὐτὸς ἀπηύρων.
>
> Il. xix. 84.

On the contrary, I am proud to own the responsibility of the truths I have advanced; and, for reconciliation with your absurd schemes, know that my motto is—"War to the knife!"

You must not think to frighten me with a great name, or that I shall be deterred from unveiling fallacies simply because they are entrenched behind a powerful apparatus of extracts. When you speak of peasant proprietors with such complacency, you seem to forget "the advantage of small properties in land is one of the most disputed questions in the range of political economy." (J. S. Mill, Pol. Ec., bk. ii. c. 6.) It would be an easy undertaking to bear out the truth of this admission by citing instances of the unfavourable operation of small ownerships; but there is a shorter cut to the same conclusion.

England cultivates on the large scale and is the wealthiest country in the world, and her landowners are, for proportionate fractions of their estates, wealthier than the Lilliputian proprietors abroad, whose whole patrimony would be equal to one of those fractions. Reconcile this fact with the advantage of peasant proprietors, and I shall be prepared to consider their claims; but, until you do so, they stand condemned.

There is, however, a very palpable error in supposing that the mere excellence of peasant proprietorships would on the abolition of primogeniture, entails, and the existing system of transfer, lead to their adoption in England. I maintain now, as I did before, that, whatever your abolition, you would have the devolution of estates as heretofore, because that devolution is in accordance with the wishes of the people, who, whenever they do not allow the rule of law to operate, almost invariably dispose by instrument much in the same manner as the rules of

descent would have disposed if left to themselves. And then for the matter of entail—that is also a cherished custom, and if destroyed would be practically restored by means of trusts or some other device.

Let us, however, assume that, by sweeping away these obnoxious institutions, you would impress on land that currency you so ardently aspire after. What would be the ultimate result? The drones you alluded to would unquestionably disappear, almost entirely; but the transformation scene would not be such as you anticipate. Instead of a fissiparous multiplication of busy bees, there would now be numerically a smaller clique of the same individuals as before, who, having swallowed and devoured most of their own species, would wear so hideous and bloated an aspect as to be scarce recognizable for their former selves. These metamorphosed and hateful drones would gradually be eaten up in the same manner, until only two or three were left, for whom the more awful fate of being engorged by a company would be reserved! It seems a contradiction in terms to assert, that, if land became the marketable article you desire, the consequence would sooner or later be to aggregate it in fewer hands and in larger masses than before. Yet, say what you will, the *grande culture* is too well established in this country to be easily superseded; therefore, the supposed best system of farming would suggest the utility of extending the farmer's operations. Thus, the successful cultivator, having the means, would be prompted to become a larger and larger owner, and the gratification of his desire would be seconded by the commercial quality conferred on the land. Companies, however, would be formed for the purchase of arable, as they already are for the purchase of building, ground; and thus sooner or later every acre in the country would be engrossed by a few persons or bodies politic.

You will perhaps reply, that co-operation is the grand multiplier of productiveness, and that the formation and success of such companies ought to be a subject of congratulation rather than of lamentation. I am as willing as Adam Smith to concede the advantages springing from mere division of labour, but, unless in a state of socialism or communism, I very much question whether the larger principle is in general beneficial. Were we to go by external facts, their eternal failures would put companies under a heavy anathema; but, even granting that uniform success were attainable, the tyranny they exercise is foreign to the free atmosphere of a free country. Who, for example, has not felt the arbitrariness of gas or water companies? Moreover, the power wielded by companies has no

counteractive; for, though apparently the co-existence of several such bodies gives the show of competition, mutual arrangement confers real and assured monopoly. We might, therefore, in following out your recommendations pass from our present Pharaohs to much severer task-masters.

In so persistently urging the adoption of peasant proprietorships as the only means of raising the condition of the labouring classes, you seem to have been strangely fighting with a shadow. There is nothing more evident than the continuous improvement in the welfare of the lower orders—an improvement which bears out the truth—"God never sends mouths but he sends meat!" Does any one for an instant imagine that the working population is not now five times as well off as a hundred years ago, or twenty times five times as well off as in the Anglo-Saxon period? Why even in benighted Ireland do not the majority of the people wear shoes and stockings, whereas in the time of Henry VIII. such a luxury, according to the veracity of the historian (Froude) was scarcely known amongst the noblest descendants of the Milesian monarchs. To be sure you will remind me of the passage in Hallam:—"There is one very unpleasing remark which every one who attends to the subject of prices will be induced to make, that the labouring classes, especially those engaged in agriculture, were better provided with the means of subsistence in the reign of Edward III. or Henry VI. than they are at present. In the fourteenth century, Sir J. Cullum observes, a harvest man had fourpence a day, which enabled him in a week to buy a comb of wheat, but to buy a comb of wheat, a man must now (1784) work ten or twelve days."* This seems to tell against the amelioration in the condition of the lower orders. But not to mention the uncertainty which the author allows to enshroud the matter, may we not back superior housing, clothing, and means of transit, without adverting to a great advance in mental acquisitions, against the mere animal comfort of a little more to eat?

Indeed, how has the transition been effected from the hunting to the nomad—from the nomad to the agricultural—and from the agricultural to the present state of society—if not through that very increase of population you so much deprecate? Nor is the labouring class that hereditary caste of bondsmen you would wish to make out. This is a free country, whose institutions breathe the life-breath of freedom—whose laws distinguish not between rich and poor—whose traditions are the record of a noble independence—whose history is full of examples of patient

* Mid. Ages, c. 9.

industry, even in the lowliest, rewarded with affluence and crowned with honour! Away, then! with that false cry of wolf, for every augmentation of the human family is shown by experience to add to the material resources of happiness.

The rough-and-ready justice your economic system administers is so dissimilar to the procedure heretofore generally in operation that a long time, I fear, must elapse before men's minds become so habituated to its forms as to have general recourse to its assistance. Surely it is too violent a stretch of barefaced assertion to pretend there could be a moral right to deprive landowners of their property on making them compensation? Is then money an equivalent for everything? Are there no associations —no ancestral connexions—no dear old family ties, which may not be reduced to a matter of pounds, shillings, and pence? Yet I must confess the incontrovertible "privilege" you deem so apparent escapes my dull comprehension; for does not the landowner go into the market, just as any other proprietor, and does he not run the same risks in buying and selling, as any other purchaser or vendor? The price of land is fixed by the rate of interest, which determines the value of that as of any other investment in a fixed source of income and the financial conditions of profitably embarking upon ventures of every kind. Where, then, is the distinction which profanes "the sacredness of property" when applied to land?

Great allowance must be made for the eccentricities and dogmatic inanities of the dreaming theorist; but that we should be called upon to sanction and approve of flagrant contradiction is rather too heavy a tax, even upon the well-disciplined forbearance of good breeding. Can you really expect me to endorse by my silence the monstrous statement that improvement in agriculture lowers or retards the rise of rent? If this be one of "the resistless engines of your political economy," I would strongly advise you to try it, on the earliest occasion possible, on some of Euclid's lines of rail, where perchance the opportune collision of a reductio ad absurdum may prevent subsequent more serious accidents.

With the hearty wish my advice may be adopted,

I am (without being an engine-driver) your fast friend,

John Doe, Esq. RICHARD ROE.

WHITEACRE,
Manor of Dale.

Sir,

Silent contempt is the appropriate answer usually accorded to the arrogant ebullitions of presuming ignorance. Persons well informed rightly deem it a thankless office to interrupt the uninstructed brawler, who clings with the stubbornness of desperation to his hopeless errors and their persistent promulgation. Of the wisdom of that unspoken reply I am fully conscious; nor should I under ordinary circumstances deviate from the prudent course thereby prescribed. In your case, however, there are elements which perhaps justify a slight departure from a rule of almost universal application; and, therefore, though the assertions you put forward resemble the disjointed and unconnected thoughts of the untutored savage or the ravings of a dangerous lunatic in a non-lucid interval, I shall, out of consideration for the long-standing relations which have subsisted between us, deign to vouchsafe some words of rejoinder to the heap of empty trash, loaded, carted, and conveyed in your last letter.

Your attempt to handle economic questions is a piece of botchery from beginning to end. Throughout you manifest the unmistakeable peculiarity of the economic quack—an utter incompetence to comprehend the method of the science, within whose domain you have so recklessly ventured to trespass. So long as that method is misunderstood, so long is political economy a trackless and untraversable region. In vain will you ponder over statistics—in vain will you study history—in vain master the "Wealth of Nations" and all the works that have followed in its wake: until the mind is imbued with a knowledge of the method, the interpretation of economic phenomena remains an unrevealed mystery. Political economy has been truly described as a science of tendencies. It speaks not in the "imperative, but, like all sciences, in the indicative mood. Its language is: This is, or, this is not." (Unsettled Questions in Pol. Ec., J. S. Mill, Ess. v.)

It says—if such and such a cause operates, such and such an effect tends to be produced—that is, such and such an effect is and will be produced in the absence of counteracting agencies. It is emphatically styled—a "hypothetical science"—not that the conclusions of any science are ever absolute (for even in the most axiomatic of sciences, do not their truths postulate this condition: that the constitution of the universe or of the human mind—according as the dualistic or Berkelian theory is ad-

mitted, respectively—remain the same?) but that in social sequence so numerous are the agents at work, as compared with those in the sequence of the more abstract sciences, that the ultimate production of any given complex result is, as depending on so much vaster a number of contingencies, more easily defeated. Yet is not the noblest of applied sciences—physical astronomy—a science of tendencies? A direct solution of the problem of the three bodies is still beyond all the powers of modern mathematics; but approximation calculates the gravitating interaction of the sun and members of the solar system with a precision and exactness, that, from a slight perturbation, can with certainty predict the presence, and assign the position of, an undiscovered planetary Neptune!

Hence, the approximative method, which yields the triumphs of astronomical deduction, can be no drawback to the attainment of economical truth; and with this preliminary vindication I shall proceed to point out how grossly you have misconceived the mode in which social problems are to be explained.

You declare that the increase of the labouring classes has been attended, not with a deterioration, but rather with an amelioration of their circumstances. This statement from your own quotations appears to be highly questionable; but for the sake of argument, I am willing to concede the point. What, may I ask, is the inference you would draw? Can you positively mean that their multiplication has been advantageous to the toilers? As well might you ascribe to the heights our gallant soldiers had to clamber at Sevastopol the success which waited on the British arms! It was in spite of the rugged cliff, as it is in spite of the pressure of numbers, victory smiled and smiles. The workman of to-day is better off than the workman of a hundred years ago, but not so well off as he might and ought to be. He is better off, because he shares in some of the crumbs that fall from a national table of prosperity, now more dainty than of yore. He is better off, because, in the general spread of education and information, he too comes in for a small addition to his mental stock. He is better off, because, notwithstanding the drag of over-population and the poorness of wages, he works more severely and assiduously, and because even in him "the effective desire of accumulation" has become much stronger. Hence, improvement is compatible with the pressure of numbers, even as lameness in an adult is compatible with a rate of progression more rapid than that of the soundest infant.

I shall now proceed to show from elementary principles the incoherency of your assertions, first, however, glancing at that

climax of confusion—the mixing up of the progress that has taken place in the transitions of society from one general stage to another general stage with the progress that may take place in any given stage. Who does not see that an increase of numbers, which forced the hunting, the nomad, and the agricultural, states to be in turn abandoned as inadequate to furnish the increased supply of necessaries was a conspicuous blessing. Nor do I deny that, if we had only to turn round and find another higher state of society, the increased population, which would drive us thereto would be also a blessing. But no such state seems in store, unless you fall back on the schemes of socialists or communists. Yet in all states of society, once a community is sufficiently numerous for the combination which will render its labour most effective, any further multiplication in that state of society must of necessity, cæteris paribus, diminish the wealth and comfort of each individual, although the aggregate resources may and probably will be augmented—the universal in economy differing from the universal of the nominalist logic, in not always following the variations of the particulars it includes.

Suppose a tribe of savages living by the produce of the chase can scour the island (let it be) they inhabit and kill the annual increase of wild animals, which affords them an abundant supply. Suppose also that their numbers are such, that their whole time, except what is devoted to needful repose, is employed either in obtaining necessaries or in fashioning the best weapons the given state of knowledge can devise. It is quite evident that under these circumstances, any multiplication of the tribe must entail gradual want and impoverishment. Let it not be said that fresh numbers can devote themselves to the domestication of animals or to the cultivation of the soil or to hunting on a more extensive scale or can migrate—all that is outside the hypothesis, which postulates the chase (the fruits of which exactly exhaust the annual breed), and that withiu the island as the only source of subsistence. Now this example is the simple case of a mere complex phenomenon, and, if it be true, as I maintain it is, no person with a glimmering of scientific method can have the least difficulty in extending its application. Nor does the element of migration when introduced shake its thoroughness, for, a time must come when the whole world would be situated as the island, and then a further multiplication would be attended with similar consequences.

Take next the nomad state and let the same assumption of an island and effective combination of labour be made—or rather, let us assume that a multiplication of the tribe will, by enabling

greater care to be devoted to them, render the flocks and herds more prolific. So far there seems to be a corresponding addition to the food of the community; but the question immediately arises, how is this surplus of sheep and cattle to be reared and fattened? Whether we assume it in the first instance or suppose that the island afterwards has all its annual herbage consumed, that inevitable result will in the long run limit the number of animals destined for consumption; and then at last further multiplication of the consumers must involve poverty and misery. This again is a simple case, which, like the example in the hunting state, is thoroughgoing and applicable to the whole world.

We now come to the agricultural state, and here what has been demonstrated for the hunting and nomad states is equally demonstrable. Let the island be again assumed and suppose only a small portion of its surface under tillage. Suppose its inhabitants to be all engaged either in tillage or in producing agricultural implements—the result being the most effective combination of labour and the greatest produce capable of being raised without either resorting to fresh land or expending a greater amount of labour on that already under cultivation. If now the inhabitants increase in number, the extra food will be raised from fresh land or from the land already reclaimed. If from fresh land, no injury will result if that land be more fertile or as fertile as the land cultivated; and if the island be of uniform fertility, then no injury will result until the whole island is reclaimed; but from that moment or from the moment when inferior ground has to be resorted to, further multiplication leads to want and wretchedness. Hence, it appears that though the number of inhabitants is such as to render combination of labour as efficient as possible on a given area, multiplication may still go on until the entire territory of a country is brought under tillage without any injurious results. This conclusion, however, involves an assumption which is not warranted by experience, viz., that all the land is equally fertile, or else that the most fertile portions are not cultivated at first or at least at an early period. In fact the reverse is the truth—that in every country the soils are of varying fertility, and that the most fertile are the first or almost the first to be cultivated—the latter fact being partly borne out by the retention under tillage of the lands earliest reclaimed, which, cæteris paribus, pay higher rent.

But under any circumstances, the time at length comes when the whole island is cultivated, and that with efficient combination of labour. Will then a further multiplication of the

inhabitants be of no detriment to their comfort and happiness? The answer to this query answers the alternative of resorting to fresh land in the first instance and enunciates the most fundamental of all economic laws. That law is styled the law of diminishing return and is thus introduced and stated:—"The limitation to production from the properties of the soil, is not like the obstacle opposed by a wall, which stands immoveable in one particular spot, and offers no hindrance to motion short of stopping it entirely. We may rather compare it to a highly-elastic and extensible band, which is hardly ever so violently stretched that it could not possibly be stretched any more, yet the pressure of which is felt long before the final limit is reached, and felt more severely the nearer that limit is approached.

"After a certain, and not very advanced, stage in the progress of agriculture, it is the law of production from the land, that in any given state of agricultural skill and knowledge, by increasing the labour, the produce is not increased in an equal degree; doubling the labour does not double the produce; or, to express the same thing in other words, every increase of produce is obtained by a more than proportional increase in the application of labour to the land."*

The truth of the above law is demonstrated by the conduct of every farmer in the world who, in cultivating more than the single rood of land most convenient to his purpose, proves, by the extra trouble he thereby goes to, that it is a better speculation to extend his operations than concentrate them on a limited area. The law of diminishing return is the only explanation of universal practice, unless indeed it be a principle of human nature to seek trouble and inconvenience for their own sake. Another demonstration of the same truth is furnished by the relative values of agricultural and manufactured products, which vary inversely as society progresses—the ratio of the former to the latter constantly becoming one of greater inequality, even after all allowances for improvements in machinery and combination of labour. Any tables of statistics will prove this assertion, but the strongest opposers of the theory are the best witnesses when they maintain—"that the raw products of the soil, in an advancing community, steadily tend to rise in price. Now, the most elementary truths of political economy show that this could not happen unless the cost of production, measured in labour, of these products, tended to rise." And again, "the exchange values of manufactured articles, compared with the products of agriculture and mines, have as population

* J. S. Mill, Pol. Ec., bk. i. c. 12.

and industry advance a certain and decided tendency to fall . . . Whether agricultural produce increases in absolute, as well as comparative cost of production depends on the conflict of the two antagonistic agencies—increase of population, and improvement in agricultural skill." * . . . But no matter what that improvement, multiplication must eventually be attended with its ever-threatening consequence, want and impoverishment. Nor is it true that so much of the world is still uncultivated or ill-cultivated, as "that for the present all limitation of production or population from this source is at an indefinite distance, and that ages must elapse before any practical necessity arises for taking the limiting principle into serious consideration." †

You say "God never sends mouths but he sends meat"—let me inquire are the laws of nature expressions of the will of God? and is improvidence to be blessed by a standing miracle? The conditions of production unlike those of distribution are part of the order established in the universe—removed from man's control, and unless the Creator is perpetually to interrupt the uniformities He himself has decreed, "it is in vain to say, that all mouths which the increase of mankind calls into existence, bring with them hands. The new mouths require as much food as the old ones, and the hands do not produce as much." ‡ "There is room in the world, no doubt, and even in old countries, for a great increase of population, supposing the arts of life to go on improving, and capital to increase. But even if innocuous, I confess I see very little reason for desiring it. The density of population necessary to enable mankind to obtain, in the greatest degree, all the advantages both of co-operation and social intercourse has, in all the most populous countries, been attained. . . . . Solitude, in the sense of being often alone, is essential to any depth of meditation or of character; and solitude in the presence of natural beauty and grandeur, is the cradle of thoughts and aspirations, which are not only good for the individual but which society could ill do without. . . . . Hitherto it is questionable if all the mechanical inventions yet made have lightened the day's toil of any human being. They have enabled a greater population to live the same life of drudgery and imprisonment, and an increased number of manufacturers and others to make fortunes. They have increased the comforts of the middle classes. But they have not yet begun to effect those great changes in human destiny, which it is in their nature and in their futurity to accomplish." §

I have entered into the foregoing discussion in order to satisfy

* J. S. Mill, Pol. Ec., bk. iv. c. 2.
† *Ibid.* bk. i. c. 12.
‡ *Ibid.* bk. i. c. 13.
§ *Ibid.* bk. iv. c. 6.

you some step must be taken, if we are to improve the condition of the masses; and as you have attempted to discredit the advantages that accrue from peasant proprietorships, the introduction of which are so much to be desired, I shall next examine the outward features of that attempt. You say that England adopts the *grande culture* and is the wealthiest country in the world—yes, and I will tell you what is more.

A handful of Athenians defeated hosts of Persians on the fields of Marathon, as if the trade and energy of Englishmen did not more than counterbalance the mistakes of their agriculture, as the valour and patriotism of those immortal Greeks more than counterbalanced the inferiority of numbers! Perhaps, however, it is only on that other fact (?) you insist, viz. that our large landowners are even proportionally wealthier than foreign peasant proprietors. I do not know on what evidence you advance this assertion; but let it be granted. My answer is, our landowners may be *absolutely* for fractions of their estates wealthier than peasant proprietors, but they are not so *relatively* to the rest of the population. The wealth of a peasant proprietor compared with that of a trader abroad is greater than the wealth of a landowner compared with that of a merchant in England. By landowners I mean owners of cultivated, not building, ground. Of course if you include such millionnaires as the Duke of Westminster, your position is beyond dispute. But we are not speaking of the proprietors of such splendid monopolies; we exclude house property with its fancy prices, and limit ourselves to the ordinary land brought into the market.

I pass now to your defence of property in land, every part of which is infected with the crudeness of blundering ignorance. What is the moral foundation upon which property rests, and is it applicable to the soil? "The essential principle of property being to assure to all persons what they have produced by their labour and accumulated by their abstinence, this principle cannot apply to what is not the produce of labour, the raw material of the earth. If the land derived its productive power wholly from nature, and not at all from industry, it not only would not be necessary, but it would be the height of injustice, to let the gift of nature be engrossed by individuals. . . . The claim of the landlords to the land is altogether subordinate to the general policy of the state. . . . The species at large still retains, of its original claim to the soil of the planet which it inhabits, as much as is compatible with the purposes for which it has parted with the remainder."*

* J. S. Mill, Pol. Ec., bk. ii. c. 2.

The foregoing extracts are a sufficient reply to the supposed injustice of compensating the landowners and of redelivering the "common inheritance" to the rightful heirs—the community at large.

In striving to gild over with an air of ordinary trafficking the undeniable privileges that appertain to the landocracy, you seem to be so entirely innocent of an elementary economic theorem that I must needs pay it a passing notice. That theorem is Ricardo's theory of rent, from which you will perceive that the landowner, as I before said, reaps where he has not sowed; that he appropriates the "natural increment of the soil," which, arising without any effort on his part from the spontaneous progress of society, ought in justice to be shared amongst the general community. The theorem in question has been described as the "Pons Asinorum of political economy," and will only be assented to when thoroughly understood. Here it is:—"The worst land in actual cultivation (in point of fertility and situation together) pays no rent; and the rent, which any land will yield, is the excess of its produce, beyond what would be returned to the same capital if employed in the worst land under cultivation."

This is the limit of farmers, not of metayer or cottier rents.* I cannot expand this doctrine as I should were I writing a treatise on political economy, nor is your ignorance worthy of such trouble. The principle rests on the facts—that the land in any country is never all cultivated; that it possesses different degrees of fertility; that land being a thing limited in quantity is a monopolized article; that there is free competition amongst the landlords for the letting as there is amongst the farmers for the buying of land. "The worst land which can be cultivated as an investment for capital, is that which, after replacing the seed, not only feeds the agricultural labourers and their secondaries, but affords them the current rate of wages, which may extend to much more than mere necessaries, and leaves for those who have advanced the wages of these two classes of labourers, a surplus equal to the profit they could have expected from any other employment of their capital."*

The objection that landlords would not let their land, unless they received rent, is founded on the idea that the gradations of fertility are nicely divided; whereas the truth is there are good and bad portions included in a holding, the former of which alone pay rent if the latter belong to the worst soil cultivated. But even supposing the fertile and unfertile portions lay in separate areas and that the landlords refused to let the

* J. S. Mill, Pol. Ec., bk. ii. c. 16.

inferior soils, what would happen?—"Merely that the increase of produce, which the wants of society required, would for the time be wholly obtained (as it always is partially), not by an extension of cultivation, but by an increased application of labour and capital to land already cultivated. Now this increased application of capital is attended with a smaller proportional return. . . . . We are to suppose no change, except a demand for more corn, and a consequent rise of its price. The rise of price enables measures to be taken for increasing the produce, which could not have been taken with profit at the previous price. . . . . And when the impulse is given to extract an increased amount of produce from the soil, the farmer or improver will only consider whether the outlay he makes for the purpose will be returned to him with the ordinary profit, and not whether any surplus will remain for rent. Even, therefore, if it were the fact, that there is never any *land* taken into cultivation, for which rent . . . was not paid; it would be true, nevertheless, that there is always some *agricultural capital* which pays no rent, because it returns nothing beyond the ordinary rate of profit."*

From the theory of rent itself I proceed to point out its consequences. According as "the margin of cultivation"—that is, the degree of inferior soil to which the wants of the community have extended cultivation—descends or ascends, rent rises or falls. Now let us consider the changes in a progressive state of society:—

Let population increase, capital and the arts of production remaining stationary:

Wages fall—profits rise—more food is required—the margin of cultivation must descend—and rent rises.

Let capital increase, population and the arts of production remaining stationary:

Wages rise—profits fall—and rent almost certainly rises, for it is highly probable the labourers will require more food or a more costly quality of food—in either of which cases the margin of cultivation descends.

Let population and capital increase with equal rapidity, the arts of production remaining stationary:

Real wages are the same—money wages rise—profits fall—rent rises.

Let the arts of production improve, population and capital remaining stationary:

Real wages rise—money wages are the same—profits are the same—rent falls.

* J. S. Mill, Pol. Ec., bk. ii. c. 16.

But "population almost everywhere treads close on the heels of agricultural improvement, and effaces its effects as fast as they are produced." . . . . "Agricultural improvement may thus be considered to be not so much a counter-force conflicting with increase of population as a partial relaxation of the bonds which confine that increase." "Agricultural improvement, then, is always ultimately beneficial to the landlord,"* *i.e.*, instead of raising the margin of cultivation it keeps it at the same level with a greater return; and thus it appears that under all circumstances the landlords appropriate that "unearned increment of the soil" which so distinguishes property in immoveables from property in moveables.

With this farewell to our correpondence, a further prolongation of which I must decline,

I am your obedient servant,

Richard Roe, Esq. JOHN DOE.

BLACKACRE,
Manor of Sale.

Sir,

The obloquy and aspersions of your last, and several other letters, shall not go unpunished. Our whole correspondence is now in the hands of my solicitors—Messrs. Sticksteady—upon whom I rely to discover good ground for a civil action or criminal prosecution. To them you are in future referred by,

Yours, &c.,

John Doe, Esq. RICHARD ROE.

WHITEACRE,
Manor of Dale.

Sir,

I despise and spit upon the venal justice of the courts of law and challenge you, if you are a man, to the unbiassed tribunal of the imperial parliament. Meantime, I warn you I shall shake off any imputations on my character as the lion shakes the dewdrops off his mane.

Your obedient servant,

Richard Roe, Esq. JOHN DOE.

P.S.—My agents are Messrs. Claptrap, to whom you are referred.

* J. S. Mill, Pol. Ec., bk. iv. c. 3.

BLACKACRE,
Manor of Sale.

Sir,

In accepting your challenge, I fling back with scorn the dastardly imputation you have dared to hurl against the inviolable and immaculate administration of justice.

And as for your dewdrops—

> There is no terror, Doey, in your threats ;
> For I am arm'd so strong in honesty,
> That they pass by me as the idle wind,
> Which I respect not.

I am your obedient servant,

John Doe, Esq. RICHARD ROE.

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